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Community Guide to Environmental & Occupational Safety Laws - Part II - Your Right to a Clean Environment: Review of Selected Environmental Laws

COMMUNITY GUIDE TO ENVIRONMENTAL & OCCUPATIONAL SAFETY LAWS

PART II
YOUR RIGHT TO A CLEAN ENVIRONMENT: REVIEW OF SELECTED ENVIRONMENTAL LAWS

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PART II

YOUR RIGHTS TO A CLEAN ENVIRONMENT:
REVIEW OF SELECTED ENVIRONMENTAL LAWS

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The Environmental Law and Justice Clinic ("ELJC") of Golden Gate University School of Law developed this part of the Community Guide to assist you and your community in addressing environmental pollution concerns. It explains several state and federal environmental laws, and provides an overview of several governmental agencies responsible for enforcing these laws. We hope you will find this Community Guide useful, such as when you want to identify and contact a governmental agency, obtain information about an environmental hazard in your neighborhood or workplace, participate in an environmental decision-making process, or voice your concerns on a particular environmental issue at a public hearing.

There are three parts to the Community Guide. Part I was prepared jointly by ELJC and another Golden Gate University School of Law clinic, the Women's Employment Rights Clinic ("WERC"), and focuses on those laws concerning access to public information and a community's and worker's right to know. This information will help you obtain information about environmental pollution and possible hazards in your community or workplace. Part II was prepared by ELJC and focuses on specific environmental statutes,

such as the federal Clean Water Act and Clean Air Act, and will help you understand and address a particular environmental pollution problem. Part III was prepared by WERC students and focuses on employment laws which seek to protect workers and promote workplace safety.

Please let us know if our community guide is useful. We welcome your comments and suggestions on how we can improve this guide. The Environmental Law and Justice Clinic and Women's Employment Rights Clinic wish to acknowledge and thank the Corporation for National Service and United States Environmental Protection Agency for their financial assistance and support.

DISCLAIMER

This community guide is intended as advisory and informational guidance only. It is designed for community groups, public-interest organizations and workers who are interested in right-to-know laws. This information is not intended as legal advice because the law can be interpreted differently depending upon the particular facts of each case.

While we have used our best efforts and taken every precaution in preparing this community guide, we assume no responsibility for any errors and omissions. Furthermore, neither the Environmental Law and Justice Clinic nor the Women's Employment Rights Clinic assume any liability for damages resulting from the use of the information in this guide.

Although the information in this document has been funded wholly or in part by the United States Environmental Protection Agency under assistance agreement number EQ999101-01-3 to Golden Gate University School of Law, it has not been subjected to the Agency's publications review process and therefore, may not reflect the views of the Agency and no official endorsement should be inferred.

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MISSION STATEMENTS

ENVIRONMENTAL LAW AND JUSTICE CLINIC

The **Environmental Law and Justice Clinic ("ELJC")** of Golden Gate University School of Law was established in the spring of 1994 and provides free legal services and education on environmental justice issues to San Francisco Bay area residents, community groups and public-interest organizations. ELJC assists communities bearing disproportionate environmental burdens, particularly communities of color and low-income neighborhoods. ELJC addresses a range of environmental justice issues by offering a combination of services: legal counseling and representation; community education workshops and guidebooks; and policy and legislative analysis.

ELJC also provides students with opportunities to develop their practical legal skills while serving these communities, by allowing students to perform client interviews, counseling, problem solving, drafting legal documents and by appearing at hearings. Our law students are considered the core of ELJC's staff and participate in all aspects of the cases, while supervised by ELJC's two co-directors, a staff lawyer and a graduate fellow. This enables our Clinic to deliver high-quality, free legal services while allowing law students to become effective environmental advocates.

WOMEN'S EMPLOYMENT RIGHTS CLINIC

The **Women's Employment Rights Clinic ("WERC")**, started in August 1993, is also part of the Golden Gate University School of Law. WERC advises, counsels and represents clients in employment-related matters, particularly low-income clients who often cannot afford legal services when confronting employment problems. WERC is staffed by law students, under direct supervision of WERC attorneys, who are also professors at Golden Gate University School of Law.

WERC clinical students and attorneys counsel clients on employment matters, including issues relating to workplace safety and illness prevention. WERC also handles unemployment insurance appeals, wage and hour claims heard by the State Labor Commissioner, and helps clients file employment discrimination complaints with state or federal discrimination agencies. WERC often advises clients on resolving employment problems informally, without having to file charges or be formally represented by an attorney. When a client is unable to resolve an employment problem on her own, WERC carefully evaluates the case to determine if formal legal representation can be provided.

If you need legal assistance with environmental or employment problems, you may contact ELJC or WERC, respectively, by calling (415) 442-6647.

CHAPTER 1

CLEAN WATER ACT

I. INTRODUCTION

Every community has an interest in protecting the quality of its water and preventing pollution. The issue of water pollution is critical to public health and wildlife, and first became evident during the industrial revolution when people dumped raw sewage and garbage into streams and bays, resulting in pollution of drinking water. As water pollution problems increased, so did the public's awareness that water is a valuable and limited resource in need of protection. Over several decades, the United States Congress has enacted numerous federal statutes to protect water resources and prevent water pollution, including:

- Federal Water Pollution Control Act, which prohibits discharges of pollutants into the waters of the United States without a permit (33 U.S.C. §§ 1251 et seq.);
- Safe Drinking Water Act, which regulates the drinking water supplied by public water systems (42 U.S.C. §§ 300f et seq.);
- Ocean Dumping Act, which prohibits the transportation and dumping of wastes into the ocean without a permit (33 U.S.C. §§ 1401 et seq.); and
- Oil Pollution Act, which makes owners of vessels discharging oil liable for costs of cleanup in the event of a spill (33 U.S.C. §§ 2701 et seq.).

Although each of these laws is important, the Federal Water Pollution Control Act ("FWPCA," also known as the "Clean Water Act") is the primary

federal statute to control and prevent water pollution. This chapter provides an overview of the federal Clean Water Act and its permit program, called the National Pollution Discharge Elimination System. This chapter also explains how an individual or organization may bring a civil action to enforce the standards of the Clean Water Act if regulatory authorities fail to do so. Finally, this chapter reviews California's state water protection laws and explains how they interact with the federal water quality laws.

II. OVERVIEW OF THE CLEAN WATER ACT

A. Purpose

The main purpose of the federal Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters."[1] This law provides a comprehensive regulatory system for protecting water quality and establishes the National Pollutant Discharge Elimination System ("NPDES"), a permit program for industrial facilities and publicly-owned wastewater treatment facilities. The Clean Water Act also protects

[1] The federal Clean Water Act was first enacted in the 1940's and significantly amended in 1972 by the U.S. Congress. This statute is found at 33 U.S.C. §§ 1251 et seq. The federal regulations for the Clean Water Act are found in 40 C.F.R. §§ 125 et seq. See Chapter 1 of Part I of this community guide for an explanation on how to find laws, including federal statutes and regulations.

"wetlands"[2] and prohibits the discharge of oil and hazardous substances into U.S. waters and adjoining shorelines.[3] Generally, environmental activists and community groups have found this statute useful because it allows a private individual or organization to file a lawsuit, called a "citizen suit," against industrial facilities and regulatory agencies to force compliance with the Clean Water Act.

B. Federal-State Partnership

In adopting the Clean Water Act, Congress recognized that state and local governments have primary responsibilities and rights to prevent, reduce and eliminate water pollution.[4] Under the Clean Water Act, U.S. EPA is authorized to, among other things: provide technical and financial assistance to states; help states establish comprehensive, area-wide wastewater treatment plans; establish water quality standards; and take enforcement actions against polluters who violate the Clean Water Act.[5] However, states and local governments are

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[2] Wetlands include saltwater marshes, mudflats and swamps, and are important as a transitional zone between open water and upland areas and as wildlife habitats.

[3] 33 U.S.C. § 1321.

[4] 33 U.S.C. § 1251.

[5] See, for example, 33 U.S.C. § 1254 (U.S. EPA's research and technical assistance activities); 33 U.S.C. § 1255 (grants to States for demonstration projects); and 33 U.S.C. § 1256 (grants to States for water pollution prevention).

primarily responsible for collecting and treating municipal sewage and preventing water pollution in their areas.

Most states have adopted and enforce their own water quality laws and, additionally, have been delegated authority by U.S. EPA to implement the Clean Water Act's NPDES permit program. States with such delegated authority administer their state water quality laws in a coordinated fashion with the NPDES program. In those states without delegated authority, U.S. EPA directly administers the NPDES permit program.

C. Effluent Limitations

Under the Clean Water Act, U.S. EPA has established federal water quality standards, called "effluent limitations," based on what is considered technologically feasible.[6] These effluent limitations apply to "point sources" and identify levels of pollutants which can be reduced by particular industries, or types of facilities, using *"best available technology"* ("BAT").[7] A facility discharging wastewater is required to comply with the effluent limitations specified in its NPDES permit. To comply with these effluent limitations,

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[6] 33 U.S.C. §§ 1311 et seq.

[7] Historically, effluent limitations were based on *"best practicable control technology"* ("BPCT"), which took into consideration several factors, including the economic costs of using a particular technology. 33 U.S.C. §§ 1311, 1314.

facilities are forced to use the "best available technology" to reduce their wastewater pollution. Publicly-owned treatment facilities (called "POTWs") must also comply with effluent limitations, which are based on "secondary treatment" standards established by U.S. EPA.

D. Regulation of Non-Point Sources of Pollution

The Clean Water Act leaves the regulation of "non-point sources" primarily to States and their localities. Examples of non-point sources include runoff from an agricultural field of crops or urban runoff occurring after rainstorms. State and local governments must develop non-point management programs, to control water pollution from non-point sources.[8] The California State Water Quality Control Board has been preparing its non-point source management program. While a discussion of non-point sources of pollution is beyond the scope of this chapter, you should contact your local regional water quality control board if you want to learn more about this type of water quality issue.

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[8] 33 U.S.C. § 1329.

III. NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

The Clean Water Act's NPDES permit program imposes responsibility for improving water quality on dischargers. Anyone who discharges pollutants or wastes from a "point source" into the "waters" of the United States must obtain a permit[9] and comply with wastewater pollution limits which are specified in the NPDES permit.[10] Every discharger is required to prepare monthly or quarterly discharge monitoring reports, documenting the quality of wastewater discharged from his or her facility. An NPDES permit typically prohibits a discharger from releasing specific pollutants into a body of water, and limits the discharge of other pollutants. For example, an NPDES permit may state that for the pollutant "lead," the discharger may not release any waste containing lead in excess of 5.6 micrograms per liter (ug/l) on any given day. A discharger who is found in violation of its NPDES permit may be subject to enforcement actions and civil and criminal penalties.

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[9] 33 U.S.C. § 1342. Under the Clean Water Act, the term "discharge of a pollutant" is defined, in part, as "any addition of any pollutant into navigable waters from any point source." The term "navigable waters" is broadly defined as the waters of the United States and includes not only surface waters such as lakes, rivers and bays, but other water sources such as wetlands. A "point source" is also broadly defined as any system from which pollutants are or may be discharged (such as a pipe or conduit). See definitions set forth in 33 U.S.C. § 1362.

[10] NPDES permit requirements are found at 33 U.S.C. § 1342.

IV. CALIFORNIA'S WATER QUALITY CONTROL LAWS

As noted, states may receive approval from U.S. EPA to administer and implement an NPDES program, if a state demonstrates that its water quality program is as stringent, or more stringent, than the federal law. California has received such authorization from U.S. EPA and is administering major elements of the federal Clean Water Act. In California, the Porter-Cologne Act and the plans and policies adopted by the State Water Resources Control Board (often referred to as the "State Board" or "SWQCB") and the nine Regional Water Quality Control Boards ("Regional Board" or "RWQCB") meet the objectives of the Clean Water Act. Because California state water laws do not completely cover every requirement of the Clean Water Act, in some instances both California state laws and federal Clean Water Act standards will apply to a water pollution problem. Activities that are subject to both state and federal regulation include: the issuance of permits for certain waste discharges; the management of "non-point" sources of waste; and the discharges to public sewage systems.

A. California's Water Laws

The Porter-Cologne Act is the primary state statute governing water quality and water pollution in California. Under the Porter-Cologne Act, the SWQCB and RWQCBs have primary authority to protect California's water quality and have developed a comprehensive California Water Management Plan. This plan guides the control, protection, conservation, development, and use of the state's water resources and is a combination of state and regional plans that are designed to accomplish the goals of the federal Clean Water Act.

SWQCB establishes state-wide policies regarding water quality, administers water rights and provides regulatory oversight over the RWQCBs. The RWQCBs develop plans that must: identify beneficial uses of the waters that are to be protected; establish water quality objectives that are intended to protect the beneficial water uses; and present an implementation program necessary to achieve those water quality objectives. Regional water quality control plans developed by RWQCBs are required to conform to the state water policy developed by SWQCB and are not effective until it approves them.

Under the Porter-Cologne Act, the RWQCBs are authorized to regulate the discharge of waste by any person that could affect the waters of the state. The waters of the state have been interpreted to include all waters within the

boundaries of the state, whether private or public, in natural or artificial channels. The state program is implemented by RWQCBs which issue NPDES permits and establish waste discharge requirements for dischargers.

Under the California State Water Program the local POTWs are responsible for setting and enforcing local pretreatment standards. RWQCBs have oversight authority regarding POTWs and establish pretreatment standards.

V. CORRECTING A WATER POLLUTION PROBLEM

The following is guidance on addressing a water pollution problem through the enforcement of a NPDES permit. Ideally, RWQCBs enforce the limitations and conditions of NPDES permits. RWQCBs may become aware of a discharger's violation of an NPDES permit through its own diligent monitoring, or through the work of local community residents. Alternatively, a local resident or community group may use the "citizen suit" provisions of the Clean Water Act to bring an action against a discharger for violating conditions of its NPDES permit.

In any citizen suit, the regulatory agency has authority to step-in and prosecute the matter. Thus, before bringing a lawsuit and to avoid preemption by a regulatory agency, you must first notify and request that the appropriate

regulatory agency enforce the Clean Water Act. After conducting preliminary research to show that a water-pollution problem exists. Then write a letter to the Regional Board, describing your research and informing the Regional Board that you intend to take legal action (i.e., bring a lawsuit) if the Regional Board does not take action in the matter.

A. Identify The Pollution Source

The first step in taking action to protect a body of water is to identify the sources responsible for the water pollution. If the source of your water pollution is a discharger's point source, then their name should be listed with the Regional Water Board if the discharger has a permit. You will have to go to the Regional Board's offices to check on the permit. If this is your first visit to a regional water quality control board then the words to remember are patience and perseverance. As with most over worked government offices, it can sometimes be frustrating trying to get the information you want. Appendix A contains a list of the addresses and phone numbers of the California Regional Water Quality Control Boards.

If you discover the discharger does not have a permit, this may be a clear violation of the CWA since all waste water dischargers must have a permit before discharging waste water. By notifying the Regional Board, it will be

informed of an unpermitted discharger and should take appropriate steps against the unpermitted discharger.

If all you know is that your favorite water body is polluted, but you do not know the source of pollution, then the starting place for your research is still your local Regional Water Board. Arm yourself with a description of the water you want protected and begin your search for possible responsible polluting parties at the Regional Water Board.

Once you have identified the source of water pollution, additional information from the Regional Water Quality Control Board now becomes necessary.

B. Regional Water Quality Control Boards

The aim of the Porter-Cologne Act is to prevent water quality problems. If problems do occur, then the regional water boards have the authority to correct the problem through administrative orders and through the administration of civil penalties. An administrative order may consist of a time schedule order, a cease and desist order, or a clean up and abatement order.

Time Schedule Order

A regional water board may require a discharger to submit a detailed time schedule of specific actions needed to correct or prevent a violation of permit

requirements. This "Time Schedule Order" may be required if a regional water board finds that a discharge of waste is taking place or threatening to take place.

Cease & Desist Order

A regional water board may issue a "cease and desist order" when a problem with a regulated discharge is serious. The issuance of a cease and desist order is appropriate when significant violations occur, or when violations are occurring and are likely to continue in the future.

Cease and desist orders and time schedule orders are designed to bring dischargers back into compliance with their discharge permits. A cleanup or abatement order may be used to remedy problems caused by unregulated discharges, such as leaks or spills. Regional water boards may also enforce the provisions of the Porter-Cologne Act through the assessment of an administrative civil liability (ACL). ACL's are monetary fines levied by the regional water board against the persons who violate their permits.

Although the regional water boards are the starting place for an enforcement action, the State water board also has enforcement powers. The Water Code provides that an aggrieved person may petition the State Water Board to review the action, or inaction of a regional board within 30 days of the regional board's action or failure to act under various provisions of the Code.

VI. CITIZEN ENFORCEMENT OF AN NPDES PERMIT

As discussed above, the National Pollutant Discharge Elimination System ("NPDES") is the primary means for the enforcement of water quality standards and the prevention of water pollution. Further, the NPDES permit is crucial to enforcement because facilities with NPDES permits are required to monitor their wastewater discharges, and submit discharge reports which state whether the dischargers are within the NPDES permit limits. These reports are called "discharge monitoring reports" ("DMR"). A file containing a discharger's current and past DMRs should be located at your RWQCB. In legal terms, DMRs are regarded as an admission that the discharger violated its permit in enforcement actions. This means that a discharger may argue other defenses, but may not argue that they have not violated their NPDES permit.

At your local RWQCB offices, you can examine DMRs filed by dischargers and identify those facilities where violations have occurred, but where the RWQCB has declined to take administrative enforcement actions against the discharger. Such cases may be appropriate for a citizen enforcement action.

The Clean Water Act authorizes citizen suits against any person alleged to be in violation of an effluent standard or limit. Before a complaint is filed, the citizen must first provide sixty days notice of intent to sue.

A. Sixty Day Notice

The Clean Water Act requires that, prior to the filing of a citizens suit against a polluter, a notice of intent to sue must be provided to the intended defendant, the Administrator of the United States EPA, and the State of California. The purpose of this "notice letter" is two-fold. First, as mentioned above, the government has the right to step-in and take over the case. A notice letter places the government on official notice that a problem exists and gives the government an opportunity to take action. The second purpose of the notice letter is to give the polluter a final chance to correct the problem. If a polluter has corrected the problem, or taken significant steps to correcting the problem, before the sixty days has passed, the citizen suit may not go forward.

A sixty-day notice letter should contain the following information:

* who you are;
* who is discharging;
* what kind of business the discharger is operating;
* what permit the discharger is violating;

* that the discharger is likely to continue the violations;

* notice that you will commence a citizen suit; and

* what remedies to the problem you are seeking.

The sixty-day notice should be sent by certified mail or delivered by personal service. Notice is deemed given on the postmark date if the notice was mailed or on the date the notice was received if it was served personally. You can begin counting the days after the other parties have notice. On the 61st day, if no action has been taken by the government or the discharger, a complaint may be filed in the proper federal district court.

It is advisable to seek the assistance of an attorney at this point as the federal judicial system can be very complex. An attorney would also be helpful in the filing of a complete sixty-day notice letter. Submitting complete legal documents to the court is important because if there is a problem with the documents the discharger may be able to attack the defects in the documents and cause the lawsuit to be dismissed. This could also result in a delay in correcting the pollution problem.

APPENDIX A

California Regional Water Quality Control Board Offices

North Coast Region
5550 Skylane Boulevard, #A
Santa Rosa, CA 95403
Phone (707) 576-2220
Fax (707) 523-0135

San Francisco Bay Region
2101 Webster Street, Suite 500
Oakland, CA 94612
Phone (510) 286-1255
Fax (510) 286-1380

Central Coast Region
81 Higuera Street, #200
San Luis Obispo, CA 93401-5414
Phone (805) 549-3147
Fax (805) 543-0397

Los Angeles Region
101 Centre Plaza Drive
Monterey Park, CA 91754-2156
Phone (213) 266-7500
Fax (213) 266-7600

Central Valley Regions
Sacramento Office
3443 Routier Road
Sacramento, CA 95827-3098
Phone (916) 361-5600
Fax (916) 361-5686

Redding Office
415 Knollcrest Drive
Redding, CA 96002
Phone (916) 224-4845
Fax (916) 224-4857

Fresno Office
3614 East Ashlan
Fresno, CA 93726
Phone (209) 445-5116
Fax (209) 445-5910

Lahontan Region
P.O. Box 9428
South Lake Tahoe, CA 95731-2428
Phone (916) 544-3481
Fax (916) 544-2271

Colorado River Basin Region
73-720 Fred Waring Drive, #100
Palm Desert, CA 92260
Phone (619) 346-7491
Fax (619) 341-6820

Santa Ana Region
6809 Indiana Avenue, Suite 200
Riverside, CA 92506-4298
Phone (714) 782-4130
Fax (714) 781-6288

San Diego Region
9771 Clairemont Mesa Boulevard, Suite B
San Diego, CA 92124
Phone (619) 265-5114
Fax (619) 571-6972

CHAPTER 2

CLEAN AIR ACT

I. INTRODUCTION

In today's world, we are constantly bombarded with new information of the dangers that directly affect our health and well-being. From the food we eat, to the water we drink, to the air we breathe, it seems that harm surrounds us. In many ways clean air is a fundamental right that most of us take for granted. However, as society gets increasingly complex, most of us are learning that the right to clean air is not guaranteed and must be protected.

Historically, air pollution problems were handled in the courts and usually involved a plaintiff claiming that a defendant emitted odors or smoke from an industrial facility and caused a public or private nuisance. To show that a public nuisance existed, the plaintiff had to show that the harm from a polluting facility was causing an unreasonable interference with a right common to the general public, such as breathing clean air. In practice, this meant that the harm from the defendant's activities had to have a significant impact on the general public health, safety, or comfort. A major drawback to public nuisance cases was that the plaintiff had to know who was responsible for the pollution. Even if the plaintiff was successful in showing that a public nuisance existed, the

courts did not necessarily order the defendant to stop polluting. If the court found that the benefits of the polluter's activities were greater than the harm the plaintiff was suffering, the court could order the defendant to pay a fine and allowed its facility to continue operating. As a result, public nuisance law limited the effectiveness of these efforts to combat air pollution.

The federal Clean Air Act ("CAA") is Congress' attempt to help control and minimize the impact of air pollution on everyone's health and well-being. In this chapter, we will analyze the requirements of the CAA as well as the governmental agencies that enforce the CAA at both the federal and state levels. Finally, we will examine what community groups can do under the CAA to try and stop air pollution in their neighborhoods, and identify resources for further information.

II. OVERVIEW OF THE CLEAN AIR ACT REQUIREMENTS

The CAA was enacted in 1963. It can be found in Title 42 of the United States Code ("U.S.C.").[11] The United State Environmental Protection Agency

[11] When the CAA was originally enacted by Congress, it was organized into sections which were numbered starting with § 101. When the CAA was codified into *United States Code* (U.S.C.), the CAA sections were renumbered from 7401 to 7671. When referring to the CAA, we will use the original statute's section numbers (e.g., CAA § 101), but will refer to both the CAA and the U.S.C. citations in the footnotes. See Chapter 1 of Part I of this Community Guide for a detailed explanation on is a "citation" and how to find laws.

("U.S. EPA") has primary authority for implementing the CAA and establishing air quality standards, but U.S. EPA relies on state and regional environmental agencies for carrying out the day-to-day responsibilities of issuing permits and ensuring compliance with the requirements of the CAA.

A. Goals of the Clean Air Act

The overriding goal of the CAA is "to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[12] To accomplish this goal, the CAA requires states to implement plans to attain designated air quality standards. Attaining these standards requires states to limit the amount of emissions from industries and other sources of air pollution.

B. Criteria Pollutants

The CAA identifies a certain category of pollutants which pose a significant risk to human health and the environment called "criteria pollutants."[13] U.S. EPA is responsible for developing a list of criteria

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[12] CAA § 101(b)(1); 42 U.S.C. § 7401(b)(1).

[13] The term "criteria" is used for this category of pollutants because the standards for such pollutants must be explained in a criteria document containing the recent scientific knowledge of variable factors (including atmospheric conditions) that could alter the pollutant's effects on public health or welfare, other pollutants that may interact with the designated pollutant to produce adverse effects on public health or welfare, and identifiable effects of the pollutant on public health or welfare. CAA § 108(a)(2); 42 U.S.C. § 7408(a)(2).

pollutants, and to establish National Ambient Air Quality Standards ("NAAQS") for criteria pollutants that may be injurious to the public health or welfare.[14] Thus far, U.S. EPA has listed six criteria pollutants: sulfur oxides ("SOx"), particulate matter ("PM10"), carbon monoxide, ozone, nitrogen oxides ("NOx"), and lead.[15]

Carbon monoxide, nitrogen oxides, and lead are primarily emitted by automobiles. Sulfur oxides are formed primarily from the combustion of fossil fuels, and electrical utilities generate two-thirds of the national SOx emissions. In addition, SOx and NOx emissions can produce acid rain because these chemicals react with water to form sulfuric acid and nitric acid. The health effects of these pollutants range from respiratory illnesses to brain damage.

Particulate matter is a generic term for discrete particles that are emitted directly from sources or are formed in the atmosphere by transformation of other emissions. The standards only apply to particulates that measure less than 10 microns in diameter. These particles often settle in the lungs and can cause

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[14] CAA § 108; 42 U.S.C. § 7408.

[15] Adding chemicals to the list of criteria pollutants can have a significant economic impact on both industry and state and local governments. The process involves major policy decision-making during which the U.S. EPA is subject to intense scrutiny by interested parties and possible challenges in court. As a result, the list of criteria pollutants is short and the latest addition was PM10s in 1987. The criteria document for acid aerosols is expected to be finalized in 1996.

respiratory illnesses. They also aggravate existing respiratory and cardiovascular diseases. The long term health effects of breathing in small particles of asbestos and coal dust are well documented.

Ozone is a criteria pollutant that is not directly emitted from any one source. Instead ozone is created by a chemical process. Volatile Organic Compounds ("VOCs")[16] and NOx are often dispersed into the stratosphere and there, a photochemical transformation occurs when the chemicals react with the sun's energy. Stratospheric ozone then mixes with NOx and VOCs to create smog. Ozone is known to cause respiratory problems.

Lead is a criteria pollutant that was not part of the original list prepared by the U.S. EPA, but was added as a result of litigation. The adverse health affects of lead are severe, especially in children. Today, limitations on lead emissions are considered one of the greatest successes of the CAA. Since 1975, the emissions of airborne lead has dropped by 92%. The largest reduction occurred when the U.S. EPA phased out the use of leaded gasoline.

C. National Ambient Air Quality Standards

National Ambient Air Quality Standards ("NAAQS") are certain limitations set by the U.S. EPA for each criteria pollutant for the ambient air.

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[16] VOCs are any organic (carbon) compounds that are emitted from a source as a byproduct of that source's processes, and which participate in atmospheric photochemical reactions.

Ambient air is defined as the air outside of buildings, to which the general public has access. NAAQS have two parts: primary air quality standard and a secondary air quality standard. The primary standards are the levels to protect public health, allowing for an adequate margin of safety.[17] These standards are designed to protect the health of any group in the population, including those who are exceptionally sensitive or at risk to air pollution, such as children or asthmatics. The term "adequate margin of safety" in the primary standards means protecting against future unknown health risks. The secondary ambient air quality standards are designed to protect the public welfare from any known or anticipated adverse affects of the air pollutants in the ambient air.[18] Public welfare is defined in the CAA to include: "effects on soils, water, crops, vegetation . . . wildlife, weather, visibility, and climate."[19] In addition, public welfare also includes such factors as economic values, personal comfort and well being. Because the secondary standards protect welfare and health, they are more stringent than primary standards. Once set, each state is given a target date by which to reach the NAAQS. The original target set by the CAA for

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[17] CAA § 109(b)(1); 42 U.S.C. § 7409(b)(1).

[18] CAA § 109(b)(2); 42 U.S.C. § 7409(b)(2).

[19] CAA § 102(h); 42 U.S.C. § 7602(h).

compliance was May 31, 1975. Amendments to the CAA have provided extensions to this compliance date for certain heavily-polluted regions, such as the South Coast Basin, until as late as 2010.

D. State Implementation Plans

The CAA is implemented by the individual states with federal oversight. This is done by having states develop and adopt State Implementation Plans ("SIP"), which are then approved by the U.S. EPA. Upon approval, the state is authorized to implement, maintain, and enforce CAA requirements, including NAAQS.[20]

Because each state is divided into various air quality regions under the CAA, each region is reviewed to determine if it is in compliance with the NAAQS. Within its SIP, a state must identify the various control measures that will be used to meet the NAAQS by a target year. Unfortunately, many states have had difficulty in bringing polluted areas into compliance with the air quality standards set by the U.S. EPA.

Each air quality region is categorized as either attainment or nonattainment for each pollutant. An attainment area is an area that meets the

[20] CAA § 110(a)(1); 42 U.S.C. § 7410(a)(1).

primary or secondary NAAQS for the criteria pollutant.[21] A nonattainment area is an area that does not meet primary or secondary NAAQS for the pollutant, or contributes to ambient air quality in a nearby area that does not meet the NAAQS.[22] It has been a particular problem for nonattainment areas to reach attainment with regard to PM10, carbon monoxide, and ozone because these pollutants have natural as well as manmade sources. Generally, manmade sources are more easily controlled than natural sources, but may not be controlled stringently enough to reach levels of attainment in combination with the natural sources.

In response to these compliance problems, the CAA has specific plan provisions for these nonattainment areas. For areas designated as nonattainment, a state must include in its SIP certain measures for pollution offsets, new source pollution controls, and tighter controls on existing sources. These requirements are implemented through a CAA permit program.[23]

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[21] CAA § 107(d)(1)(A)(ii); 42 U.S.C. § 7407(d)(1)(A)(ii).

[22] CAA § 107(d)(1)(A)(i); 42 U.S.C. § 7407(d)(1)(A)(i).

[23] Before a permit is issued for a new or modified source of pollution in nonattainment area 5 conditions must be met: 1) the pollution emitted from the new source must be offset by reductions in total emissions from all existing sources; 2) the new source must meet lowest achievable emission rates; 3) the owner of the source must show that all other sources it owns or operates are in compliance; 4) the EPA administrator has not made a finding that the SIP is not being implemented in the area; and 5) analysis of alternate sites showing that the proposed source significantly outweighs the environmental and societal costs.

The CAA defines different pollution control technology that is to be applied to existing sources and new or modified sources of pollution. Existing sources in nonattainment areas are required to use reasonably available control technology ("RACT").[24] RACT is defined by the EPA as techniques that are reasonably available taking into account: 1) the need for controls, 2) the social, environmental and economic impact of using the technique, and 3) alternate means of achieving the standards. New sources of pollution in nonattainment areas must attain the lowest achievable emission rate ("LAER").[25] LAER is defined as either: 1) the most stringent emission limitation used by any state for this category of source, or 2) the most stringent emission limitation which is achievable in practice by such a source.[26]

In attainment areas, new or modified sources must use "best available control technology" ("BACT").[27] Attainment areas are regulated under a program called "Prevention of Significant Deterioration" ("PSD"). This means that the current baseline for emissions of each criteria pollutant cannot be

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[24] CAA § 172(c)(1); 42 U.S.C. § 7501(c)(1).

[25] CAA § 173(a)(2); 42 U.S.C. § 7503(a)(2).

[26] CAA § 171(3); 42 U.S.C. § 7501(3).

[27] CAA § 165(a)(4); 42 U.S.C. § 7475(a)(4).

exceeded. Thus, new and modified sources must install BACT as well as obtain offsets from existing facilities equal to the new or modified facility's emission so that the emissions baseline remains constant. BACT is determined on a case-by-case basis for each pollutant, and is based on the maximum degree of pollutant reduction, taking into account energy, environmental, and economic impacts and other costs.[28]

The 1990 amendments to the CAA attempt to help correct some of the lingering problems with SIPs. Today, air quality regions are classified as attainment, or marginal, moderate, serious, severe, and extreme nonattainment areas. As a region's severity of nonattainment increases from marginal to extreme, the SIP revision requirements also increase. For example, marginal areas require vehicle inspection and maintenance programs while extreme areas require all the programs required for lesser nonattainment areas as well as traffic control measures. Currently, only Los Angeles has been categorized as an extreme area, and that category applies to ozone.

E. Federal Implementation Plans

The CAA also provides for a mechanism in the event that a state's pollution control plan is not effective. U.S. EPA is required to issue a Federal

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[28] CAA § 169(3); 42 U.S.C. § 7479(3).

Implementation Plan ("FIP") under either of two conditions: (1) the state has failed to make a plan, or the plan does not meet the minimum criteria; or (2) the U.S. EPA disapproves a state's plan in whole or in part. The FIP serves the same purpose as a SIP, and it is just as binding on the state. However, the U.S. EPA will usually delay issuing a FIP if the state corrects the defects in its SIP before the FIP is issued.

In practice, the U.S. EPA is reluctant to issue a FIP unless it is forced to do so. For example, under court order, the U.S. EPA promulgated FIPs for the South Coast Basin (Los Angeles, Riverside, and Orange Counties); Ventura County; and Sacramento County in 1994. EPA's reluctance stems from the fact that addressing chronic air pollution problems may involve significant social and economic decisions and staff time -- obligations that are burdensome and politically controversial.

F. Hazardous Air Pollutants

Industry information provided to the U.S. EPA Office of Air and Radiation in 1988 estimated that 2.4 billion pounds of toxic pollutants were emitted into the air that year. Some of these pollutants are carcinogenic and known to cause health risks, but many of them are not a health threat and are not listed as criteria pollutants.

In response to concerns over the health risks posed by certain toxic air pollutants, section 112 of the CAA regulates hazardous air pollutants. The 1990 amendments to the CAA identified an initial list of 193 hazardous air pollutants and includes asbestos, benzene, chlorine, methanol, naphthalene, polychlorinated biphenyls ("PCBs"), toluene, and heavy metals such as cadmium, chromium, and lead.

Under section 112 of the CAA, U.S. EPA is authorized to develop emission standards for all listed hazardous air pollutants. These standards were to be applied to both existing and new sources. New and existing sources are to comply with the best technology requirement, also referred to as the "maximum degree of reduction in emissions that is deemed achievable" ("MACT").[29] The MACT standard requires that a new or existing source of pollution use the most stringent emission control that is being used by the best controlled similar source, as determined by the U.S. EPA.[30]

Section 112 of the CAA regulates two types of sources: major sources and area sources. A major source emits either 10 tons per year of a particular hazardous pollutant or 25 tons per year of a combination of hazardous

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[29] CAA § 112(d)(2); 42 U.S.C. § 7412(d)(2).

[30] CAA § 112(d)(3); 42 U.S.C. §7412(d)(3).

pollutants. An area source includes all sources that emit less than 10 tons of a particular pollutant or less than 25 tons of a combination of pollutants. Typically, an area source covers small facilities that routinely emit pollutants, such as service stations and dry cleaners. Because of their small individual contributions to pollution, less stringent control technology is required for area sources than major sources.

Similar to the state's responsibility to develop a SIP to address the levels of criteria pollutants, the state must also develop a program to implement and enforce the emission standards for hazardous air pollutants. The state program is described in section 112(l) of the CAA. Many of the standards for hazardous air pollutants are still being developed by the U.S. EPA.

G. Federal Permits

Sources of air pollution regulated by the CAA are classified as either stationary sources or mobile sources. Mobile sources mainly refer to cars, trucks, buses and other motor vehicles, but can also include ships, recreational vehicles, and even lawnmowers. Stationary sources refer to sources which are not mobile, such as industrial plants, refineries, and other businesses that emit air pollution, including dry cleaners and auto body paint shops.

The CAA requires states to administer permit programs as part of their SIPs or FIPs. Generally, a permit program requires anyone who is currently or will be emitting criteria or hazardous pollutants to obtain a permit. Under the CAA's permit provisions, it is unlawful for any person to violate any requirement of a permit or to operate a source of air pollutants except in compliance with a permit.[31]

Permits are required for new and modified sources in attainment and nonattainment areas. Permit conditions and requirements are found in section 504 of the CAA, and include enforceable emission limitations and standards, a schedule for complying with the emission limits, monitoring and reporting requirements, and inspection requirements.

H. Sanctions and Enforcement

This section discusses some of the sanctions and enforcement provisions provided by the CAA. Most enforcement activity is carried out by local air districts and the U.S. EPA.[32] The U.S. EPA's enforcement responsibilities

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[31] CAA § 502; 42 U.S.C. § 7661a. A person is defined as an individual, corporation, partnership, association, State or municipality. CAA § 302; 42 U.S.C. § 7602.

[32] Some states have developed their own air pollution control laws. For example, in California, local Air Quality Management Districts are responsible for administering the California Clean Air Act, found in Division 26 of the Cal. Health and Safety Code (starting at section 44300). In such cases, state agencies usually administer both state and federal air quality laws. However, the U.S. EPA is ultimately responsible for ensuring that each state complies with the federal CAA.

include issuance of administrative orders and imposing penalties and conducting civil or criminal prosecution cases in court. Major categories of violations that the U.S. EPA can prosecute include: SIP violations, violation of New Source Performance Standards, violation of hazardous air emissions standards, violation of permits, reporting and recordkeeping, monitoring, and inspection requirements. Based on the severity of the violation, the U.S. EPA can issue an administrative order, assess a penalty, or refer the case to the Department of Justice to file criminal charges against the offending facility, or any combination of the above.

The U.S. EPA can assess penalties up to $ 25,000 per day to a maximum of $ 200,000,[33] or issue a field citation for up to $ 5,000 in administrative penalties.[34] In criminal proceedings, knowing violations are a felony instead of a misdemeanor,[35] and the crime carries sanctions of a 15-year prison term and

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[33] CAA § 113(d)(1); 42 U.S.C. § 7413(d)(1).

[34] CAA § 113(d)(3); 42 U.S.C. § 7413(d)(3).

[35] CAA § 113(c)(2); 42 U.S.C. § 7413(c)(2).

a $15 million fine.[36] The U.S. EPA can also award citizens $ 10,000 for providing information that leads to a civil or criminal conviction.[37]

For new sources in nonattainment areas, the U.S. EPA can require higher emission offsets as a permit condition. Moreover, if the state is unable to provide adequate oversight of the CAA, then the U.S. EPA can administer the CAA.[38]

III. ROLE OF STATE AND LOCAL AGENCIES

The issuance and monitoring of CAA permits is primarily the states' responsibility.[39] Under section 107 of the CAA, each state is divided up into air quality control regions. Air quality control regions were first required under the Air Quality Act of 1967. An air quality region is defined by scientific factors, such as meteorological characteristics, and political factors. U.S. EPA has identified 247 air quality control regions in the country.

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[36] CAA § 113(c)(5)(A); 42 U.S.C. § 7413(c)(5)(A).

[37] CAA § 113(f); 42 U.S.C. § 7413(f).

[38] Usually, the U.S. EPA takes over control of these programs as a last resort. States are given 18 months to correct problems in their SIPs or permitting programs before the U.S. EPA imposes sanctions, and two years to correct weaknesses in the state program before the U.S. EPA would directly administer the CAA program.

[39] CAA § 502(d); 42 U.S.C. § 7661a(d).

In California, two levels of state agencies are responsible for implementing the CAA. The State Air Resources Board ("SARB") is responsible for establishing the SIP and overseeing the state's permit programs, as well as carry out certain responsibilities under the California Clean Air Act.[40] Regional air quality management districts ("AQMDs") have direct responsibility for carrying out the mandates of the SIP and enforcing permit programs. SARB has reviewing power over the AQMDs. In California, there are four AQMDs that generally cover large metropolitan areas: the South Coast AQMD, the Bay Area AQMD, the Sacramento Metropolitan AQMD, and the Mojave Desert AQMD. There are also thirty-three air pollution control districts ("APCD") with authority to regulate air quality over one or more counties or incorporated areas.

As mentioned earlier, California also adopted a state Clean Air Act which is similar to the federal CAA, but has more ambient air quality standards than found in the federal CAA. The California statute includes standards for hydrogen sulfide, sulfates, visibility-reducing particles, and vinyl chloride in addition to the six criteria pollutants found in the CAA. Unlike the CAA, the

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[40] See, Part 2 of Division 26 of the Cal. Health and Safety Code (starting at § 39600).

California statute has no specified deadlines for meeting certain air quality standards nor does it include sanctions for failure to meet the standards.

IV. ASSERTING YOUR RIGHTS TO CLEAN AIR UNDER THE CAA

A. Rulemaking Process and Challenging Permits

As a member of the public, you have a right to comment on proposed environmental rules and regulations before they are officially adopted by the U.S. EPA. In fact, the CAA encourages public participation in the rulemaking process. Although U.S. EPA has already adopted many of the implementing regulations for the CAA, they are still subject to amendments. Commenting during U.S. EPA's rule-making is one way to participate in the decision-making process. We recognize, however, that the issues facing many neighborhood groups are more immediate.

Usually, community groups are concerned with air pollution which is generated from an existing industrial site or potential pollution from a proposed new facility in their neighborhood. In such situations, challenges in the local permit process may prove to be a more effective and practical tool than working at the national rule-making.[41] Affecting the local permitting process can be

[41] Local decision-making may also affect the national CAA program because the U.S. EPA looks to local programs in making changes at the national level.

difficult and challenging because there is no notice given of permits to be issued for small facilities. You may be able to participate in the permitting process for large facilities that have a potential significant effect on the environment, under the California Environmental Quality Act. Generally for small facilities, neighbors or people aggrieved by a neighboring facility must wait for the permit to be issued and then, within ten days, file an appeal with the local district Hearing Board to challenge the permit.

A business is required to apply for a permit prior to construction or modification of its facility. A facility is only required to have a permit for emitting criteria pollutants and/or chemicals listed as hazardous air pollutants. No permit is required under the CAA for emissions of unregulated chemicals even though they may pose health risks. A permit must include a compliance plan, emission limitations and a schedule for meeting the limitations.

When challenging a permit, community residents should raise objections based on the permit not meeting the requirements of the CAA. For example, showing that the emissions allowed in the permit exceed or will exceed the emission standards or limits would be an effective objection. In addition, challenges may be raised about the technology being used by the facility. In attainment areas, the facility must use BACT, and in nonattainment areas, the

facility must use LAER, as discussed in section II.D. If the challenge is successful, the permit may be rescinded or the facility may be required to adopt more stringent pollution control measures. If unsuccessful and the aggrieved party feels the wrong decision was made, the permit may be challenged in court.

B. Case Studies

To illustrate how community groups can challenge facilities that emit air pollutants, three case studies from the Environmental Law and Justice Clinic ("ELJC") will be described. These challenges can be an effective tool for local residents and community groups to gain leverage against polluters.

1. Masonite Corporation

Masonite Corporation has operated a hardboard panelling and siding manufacturing facility in Ukiah, California since 1951. Masonite operated two product lines and in 1989 modified one, which began operating in 1990. In early 1992, the U.S. EPA and the Mendocino County APCD ("MCAPCD") began an formal inquiry into the operation of the company's modified line. As a result, Masonite entered into a stipulated order of abatement, under which Masonite was allowed to continue operating the line, but was required to install a regenerative thermal oxidizer to control particulate emissions and odor. The U.S. EPA also concluded that the new line was a major modification of a major

stationary source under the CAA due to the increased emissions of VOCs. While VOCs are not a criteria pollutant, they are a precursor to ozone, and are regulated under the PSD regulations. Thus, Masonite needed a PSD permit, which it had not obtained.

The U.S. EPA issued a notice of violation to Masonite because it had not obtained a permit as well as an order directing Masonite to apply for an after-the-fact PSD permit. Masonite filed its application in September of 1992. A PSD permit requires the applicant to apply BACT to a major modification. The permit applicant is responsible for proposing BACT, but the ultimate decision is made by the permitting authority, in this case the U.S. EPA. The U.S. EPA issued a draft PSD permit in November, 1993.

In January, 1994, Citizens for a Healthy Ukiah ("CHU") contacted the ELJC asking for help in the permitting process. With assistance from ELJC, CHU submitted comments and participated in the public hearing on the permit in late January. The final permit was issued in May with essentially the same emissions limitations that were included in the draft permit. In June, on behalf of CHU, ELJC filed a petition for review before the Environmental Appeals Board of the U.S. EPA.

They challenged assumptions made by U.S. EPA in its BACT analysis, complained about what should have been considered in the BACT analysis, and what constituted BACT for the facility. The Board concluded that errors were made in the BACT analysis, and Region 9 of the U.S. EPA should reconsider several aspects of the permit and its BACT analysis.

This process was very technical, and community residents, law students, and lawyers had to learn some basic information on technologies for a complex manufacturing process. Local residents were initially annoyed by the odors from the facility, but as information was gathered from MCAPCD, they learned their problems were more complicated. Those odors contained compounds that are hazardous to human health. The lesson to be learned is that community residents must be aware of their corporate neighbors and what they are doing. There may be an opportunity to improve air emissions in the community by requiring more stringent air emission-controlling technology.

2. Chevron

Chevron operates a large refinery in Richmond, California. Since the mid-1980's, Chevron had been gearing up for modifications to implement the production of cleaner fuels. Several projects had been undertaken to modify plants or build new plants. In 1992, Chevron began the environmental review

process for its Clean Fuels Project. Two local citizen groups, West County Toxics Coalition ("WCTC") and Communities for a Better Environment ("CBE" and formerly known as Citizens for a Better Environment), became involved in the public participation process provided by CEQA because the project required an environmental impact report ("EIR"). WCTC and CBE commented on the draft EIR, but the final EIR was certified without any major changes to the draft.

The next step in the process was for Chevron to apply for an air permit from the Bay Area AQMD ("BAAQMD"). WCTC and CBE contacted ELJC, the Environmental Law Community Clinic, and the Lawyers' Committee for Civil Rights to help them continue the challenge to the Clean Fuels Project. A draft permit was issued by BAAQMD. WCTC and CBE filed comments on the permit arguing that BACT was not being used on the facility. A final permit was issued without requiring the BACT that WCTC and CBE had proposed. Thus, an appeal was filed with the BAAQMD Hearing Board.

In the meantime, WCTC and CBE had been meeting with Chevron to settle their disputes. The appeal had the potential of prolonging the permitting process for Chevron for months. WCTC, CBE and Chevron eventually came to an agreement that required Chevron to make improvements to the environmental

quality, open space, and visual quality of the community; pay approximately $5 million over five years to support non-profit agencies providing services to the community, and recruit and train people from the community for jobs; install experimental air monitoring equipment; install BACT proposed by the community; and participate in an EPA emission reduction program.

This settlement is what has come to be known as a "Good Neighbor Agreement." Using the administrative Hearing Board process gave WCTC and CBE the leverage they needed to get Chevron to make some positive changes to its project that helped protect the health of the community.

3. West Berkeley

In January 1994, a group called Residents Concerned About Toxics in West Berkeley ("Residents") contacted ELJC to help the neighborhood stop, or at least control the odors coming from a neighboring auto body paint shop. The shop had been operating there for about 30 years, but the neighborhood had only recently organized to voice complaints to the BAAQMD and the City of Berkeley.

The neighborhood was also very concerned about the health impacts of the emissions from the shop. Several neighbors had died from lung-related illnesses that the group attributed, at least in part, to the emissions.

Information was gathered from local agencies, and the information showed that the auto body paint shop industry uses products that contain such toxics as toluene, lead, hexavalent chromium, and cadmium. This particular facility used toluene, emitted particulates, and sprayed paint outside its spray booth next to nearby residences. A BAAQMD report showed that the facility used 1448 gallons of top coats per year, which had large percentages of organic solvents. BAAQMD averages that five pounds of VOCs are contained in one gallon of top coat. Thus, the facility was emitting 7240 pounds of VOCs per year.

Residents made numerous complaints to BAAQMD; however, they could not establish that the facility was a public nuisance under BAAQMD regulations. An office conference was called with the facility to discuss the emission problems. There, installation of a carbon filtration system, which would help control odors and VOCs, was discussed. Nothing was required of the facility from this meeting, however.

Shortly after this meeting, the building was purchased by a new owner, but the lessee had a lease until March, 1995. The new owner began leasing the adjacent building, still at the same address, for his own auto body paint shop. He applied for an air permit from BAAQMD. The combined emissions from

the address now exceeded 8000 pounds of VOCs per year. Residents filed an appeal with the BAAQMD Hearing Board on the new permit.

In addition, Residents began negotiating a settlement agreement with the new owner. The lessee left the facility in November, 1994. Shortly thereafter an agreement was made between Residents and the new owner. The settlement stated that Residents would dismiss the permit appeal if the new owner would do all painting inside the spray booth and all other operations inside the building as well as cap his paint usage at 300 gallons per year unless and until he installed better control technology. Thus, VOC emissions are now only 1500 pounds per year--at least an 80% reduction in emissions from the peak emissions when both shops were operating, and a greater reduction in particulate emissions.

On another front, Residents influenced BAAQMD when it amended its auto body paint shop rule. The comments on the rule asked that the rule contain provisions: (1) requiring painting to be done in a spray booth, (2) operations occurring outside the spray booth, other than painting, take place 50 feet from property lines, and (3) that products containing lead, hexavalent chromium, and cadmium be banned. The final rule contained a provision requiring that top coat painting be done in a properly maintained particulate filtration media effective

April 1, 1995. This meant that painting had to be done in a spray booth or prep station, which both have positive air flow and filters. This provision controls 87% of particulate emissions from painting.

This neighborhood group used the BAAQMD Hearing Board appeal process to reach a settlement with a neighboring polluter, which reduced and controlled VOC and particulate emissions from the facility. In addition, Residents used the public hearing process for rulemaking by the district to effect a positive change throughout the auto body paint shop industry.

C. Freedom of Information Requests

Decisions reached by the U.S. EPA and state agencies often are based on detailed technical studies and reports, including information given by the facility owner that identify the amounts and types of chemicals that will be emitted. Under federal law, individual community residents have a right to obtain copies of public information used by a federal agency and included as part of its records.[42] You also have similar rights to information maintained by state agencies under the California Public Records Act.[43] Collecting and

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[42] Your rights under the Freedom of Information Act are described in Chapter 3 of Part I of the Community Guide.

[43] The California Public Records Act is described in Chapter 4 of Part I of this community guide.

maintaining information is very important because challenging a permit requires a factual investigation to support your claim that the CAA has been violated. This information is also useful for drafting comments and preparing for public hearings.

D. Citizen Suits

The CAA allows persons and organizations to file lawsuits to compel government agencies and facilities to comply with the CAA. Congress included these "citizen suit" provisions because it recognized that governmental agencies may not always vigorously enforce the CAA, due to a lack of resources or political will. Under the citizen suit provisions of the CAA, a person or organization can sue the source of pollution, the U.S. government, state and local governments, firms that do not obtain and abide by permits, and the U.S. EPA for failing to carry out its duties under the CAA.[44] Courts have jurisdiction in these cases to enforce emission standards, limitations, or orders; order the U.S. EPA to perform a non-discretionary (mandatory) act or duty; and assess penalties, which fund U.S. EPA enforcement activities. Under the statute,

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[44] CAA § 304(a); 42 U.S.C. § 7604(a). Although the term "citizen suits" is used in the CAA, these civil lawsuits may be filed by any "person" which is defined as "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agency, or employee thereof." CAA § 302(e); 42 U.S.C. § 7602(e).

a prevailing party can file a petition to recover the costs of litigation and attorney's fees for these cases.

To file a lawsuit under the CAA, a person has to meet certain requirements. First, the person is required to give the entity he or she is suing a notice, called a "Notice of Intent to Sue," which informs the prospective defendant that the citizen will file suit in 60 days if the violation is not remedied.[45] The 60-day notice gives the governmental agency time to prosecute the offender itself, or correct the alleged claims if it is the offender. The Notice of Intent to Sue must be sent to the alleged violator, the U.S. EPA, the state agency responsible for implementing the SIP, and the U.S. Attorney General. The courts have interpreted this provision of the CAA literally, and have dismissed otherwise valid lawsuits for failure to provide this important notice.

Second, if the U.S. EPA or state "has commenced and is diligently prosecuting a civil action in court," no citizen suit may be brought.[46] However, to defeat a citizen suit action, the U.S. EPA or state must show that it is "diligently prosecuting" the violation. When determining whether the

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[45] CAA § 304(b); 42 U.S.C. § 7604(b).

[46] CAA § 304(b)(1)(B); 42 U.S.C. § 7604(b)(1)(B).

agency's efforts to prosecute the violator are diligent, the court will look at the steps the agency has taken to bring the facility into compliance, the agency's ability to provide relief to the plaintiff, sanctions the agency may have imposed on the violator, and the agency's oversight of the facility's violations.

Furthermore, for citizen suits, a person must show that he or she has "standing" to file the lawsuit. In its simplest terms, "standing" requires the person to show that he or she has been personally affected by a facility's emissions or the agency's failure to act.[47] If a party does not meet the requirements for standing, the complaint will be dismissed. Finally, a citizen suit must allege clear violations of the CAA. Citizen suits filed under the CAA are heard in federal district courts.

As discussed in the case studies, and as a practical matter, individuals or community groups can make challenges at the administrative level on air quality permit issues. In order to challenge a facility for non-compliance with its CAA permit, however, you usually need to show emissions from the facility exceeded permit limits. This information is sometimes difficult to obtain. Until recently,

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[47] To show proper standing a party must prove four elements: (1) the party must have been personally injured; (2) the injury suffered must be a type which the act was meant to prevent; (3) the actual injury suffered by the party must be traceable to the defendant; and (4) the harm suffered has to be redressible by the courts. In other words, the court needs to have the power to correct the harm suffered.

the CAA did not require extensive monitoring and reporting by companies. This resulted in limited publicly-available information for community groups to use in their complaints about permit violations. However, in the fall of 1995, CAA regulations were implemented that now require major sources to monitor and report emissions for their air permits.[48] This will generate data and reports that community groups could use for enforcing the CAA.

V. WHO DO I CONTACT?

A. Structure of the U.S. Environmental Protection Agency

The U.S. EPA is part of the Executive Branch of the Federal Government. The head of the U.S. EPA is appointed by the President. Most of the working level staff in the U.S. EPA are career government workers and are not subject to dismissal when a new administration takes over. The main office of the U.S. EPA is located in Washington, D.C. The U.S. EPA is subdivided into ten separate regions and each regional office is responsible for enforcing the CAA in its respective area. California is part of Region 9, which has main offices in San Francisco. The regions are organized into different divisions to help implement the various environmental regulations. For example, Region 9 has

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[48] CAA § 502(b)(2); 42 U.S.C. § 7661a(b)(2).

separate divisions for water management, hazardous waste management, and overall policy management. The Air and Toxic Division administers the CAA.

U.S. EPA's Air and Toxic Division is further divided into branches that deal with different issues, such as air quality, air compliance, rulemaking and enforcement. If you have a particular question or need help from the Regional U.S. EPA office, the best approach would be to first contact the Air and Toxic Division. Your call will be routed to the appropriate branch and individual when you explain what type of information you are interested in getting. This will also be the most productive approach since the U.S. EPA, like many government agencies, undergoes fairly frequent re-organizations.

B. Structure of State Agency

Both the Federal CAA and the California CAA are administered by the SARB. SARB has eleven members who are appointed by the Governor of California and approved by the Senate. Once selected to the SARB, a member serves until replaced by the Governor. Of the 11 members, 6 are selected based on specific qualifications while the remaining 5 come from local air pollution control districts. One member of the SARB is selected by the governor to act as Chairperson. The Chairperson is a full time position, while the other members act on only a part-time basis. SARB is the state organization responsible for

setting ambient air quality standards for the state and preparing California's SIP. SARB is the organization that represents the state in matters involving the CAA.

C. Structure of Local Agency

Most of the actual responsibility for air pollution control lies with the local AQMDs and APCDs. California has 33 APCDs and seven AQMDs. The APCDs are generally divided along county lines, although four APCDs include more than one county. The AQMDs cover much wider territory than the APCDs. For example, the Bay Area AQMD covers the nine greater Bay Area counties. The South Coast AQMD includes Los Angeles, Orange, Riverside, and San Bernardino counties. The AQMDs and the APCDs regulate enforcement and permitting within their areas.

VI. CONCLUSION

As you can see, the CAA is a complicated statute to understnad as well as to implement. As a practical matter, it is not very user-friendly. However, now that you understand its structure, you will be able to impact its processes, whether it is at the rulemaking, permitting, or enforcement level.

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Government Agency Telephone Numbers

U.S. Environmental Protection Agency - SF Office:

1. Regional Administrator: 415-744-1004
2. Air and Toxics Division: 415-744-1219

California Environmental Protection Agency:

1. Secretary for Environmental Protection: 916-445-3846
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CHAPTER 3

CALIFORNIA ENVIRONMENTAL QUALITY ACT

I. INTRODUCTION

The California Environmental Quality Act ("CEQA")[49] was passed in 1970 and is one of the most important statutes for protecting the environment in California. A similar national law, the National Environmental Policy Act ("NEPA"),[50] was adopted in 1969 and used as a model statute to draft CEQA. The California legislature determined that long-term protection of the environment should be a guiding principle behind public decision-making. As a result, CEQA requires state and local public agencies to identify, consider, and minimize or avoid any environmentally-harmful impacts of activities which they propose to approve or carry out.

Public agencies, such as towns, cities, counties, and city, state or regional boards, departments and districts, must also publicly disclose their decision-making processes through written documents. Local residents and community

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[49] CEQA (pronounced "see-kwa") can be found in the California Public Resources Code §§ 21000 et seq. It was passed by the California legislature in response to growing public interest in preserving and improving the quality of the environment.

[50] NEPA, like CEQA, requires federal agencies to consider the potential environmental impacts of federal projects. Some projects may be subject to environmental review under both CEQA and NEPA. See Chapter 4 of this Part II of the community guide for further information on NEPA.

groups then have the opportunity to review and comment on the agency's actions and documents. Community residents and activists may also present evidence which supplements, expands or contradicts the agency's findings. Agencies must then respond, in writing, within a specified time frame, to the public's comments.

If an agency decides to approve a project deemed "potentially harmful" by imposing certain "mitigation measures" to avoid or alleviate the potentially harmful environmental impacts, the agency must include a monitoring program as part of the conditions of project's approval. On the other hand, if a potentially harmful project is approved and the agency finds those impacts can not be mitigated or avoided, CEQA requires the agency to publicly disclose in writing its reasons for going forth with the project. The reasons for such approval must be of overriding importance.

Public participation is a key part of CEQA and partly what makes it a valuable environmental statute. Because CEQA provides specific time periods for public review and comment, submitting comments in a timely manner is important and can significantly expand an agency's inquiry into a project's potential environmental impacts. This expanded investigation increases both the

accountability of public decision-making and environmental protection from harmful projects.

The California Office of Planning and Research ("OPR") has adopted regulations for the implementation and administration of CEQA, which are called "CEQA Guidelines."[51] These regulations help clarify CEQA concepts such as when "significant effects" may occur, thus helping agencies to determine when an environmental impact report ("EIR") will be necessary. CEQA Guidelines also explain and exemplify the statutory provisions of CEQA and identify its objectives and certain criteria for project evaluation, and for the preparation of EIRs or other related environmental documents.

II. CEQA'S PURPOSES

The primary purposes of CEQA are to identify the potential environmental impacts of any public or private project that state or local government has authority to approve or carry out, and to eliminate or reduce those impacts. CEQA is meant to:

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[51] CEQA Guidelines can be found in the California Code of Regulations, Title 14, §§ 15000 et seq.

1) Alert agencies and the public to the potential environmentally-harmful effects of proposed projects. (This is CEQA's "environmental alarm bell" function.)

2) Identify ways that environmental damage can be avoided or reduced.

3) Prevent avoidable damage to the environment by requiring project changes such as using feasible alternatives or mitigation measures.

4) Publicly disclose an agency's reasons why it approved a project where significant environmental effects cannot be avoided or reduced.

5) Promote public participation in local government decision-making.

6) Require public agencies to coordinate their environmental review of projects.

III. CEQA'S ENVIRONMENTAL REVIEW PROCESS

A. CEQA Applies to Discretionary Projects of Public Agencies

CEQA applies to public governmental agencies that approve or carry out projects which are discretionary. These "agencies" may include such entities as: a city, county, or regional or state government department or district (for example, a local sanitation district). A public agency which has the principal responsibility for carrying out or approving a project is often referred to as the "lead agency" for purposes of CEQA.

The lead agency determines what documents will be required in order to fully disclose all the potential environmental impacts of a project. This lead agency must receive all CEQA comments in order for them to be considered. "Responsible agencies" are other public agencies which have some discretionary approval power over the project, but do not have the main responsibility for overseeing the project.[52]

CEQA only applies to "projects." "Project" means an activity which may cause either a direct physical change in the environment or an activity with a reasonably foreseeable direct or indirect impact on the environment. In addition, the activity must:

1) be undertaken by a public agency, whether directly or under government contract;

2) receive financial support from a public agency; or

3) require governmental approval such as through the issuance of a permit (examples include building permits, grading permits, permits for clearing of land). A private project is considered approved under CEQA Guidelines "upon the earliest commitment to issue . . . a discretionary contract, grant subsidy, loan, or other form of financial assistance, lease, permit, license, certificate or other entitlement for . . . the project."

Finally, CEQA applies to "discretionary" projects. A discretionary project is one which involves agency judgment in deciding whether the project should

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[52] CEQA Guidelines § 15367.

be carried out or how it will go forward. Usually, a discretionary project is where the agency has the authority to require changes to a project which would mitigate potentially significant environmental impacts. For example, a discretionary project may include a new building project or a change in local laws, such as amending a city's general plan.

Ministerial projects are exempt from CEQA review. A ministerial project is one which involves little or no agency or official judgment in deciding whether or how the project should be carried out or allowed to go forward. Generally, ministerial projects are those which are approved if they satisfy a standard checklist of criteria. In other words, if the project fulfills the criteria, the project will be approved. Agency staff have no authority to deny the project approval if the specified criteria are met.

For example, a builder seeking a fence-building permit where regulations allow the building of any fence under 8 feet high would be issued a permit if the applicant satisfied the basic criteria for the permit and the proper fee(s) and forms are filled out for a six-foot high fence. Because most such projects are small, routine, and may have little environmental impact there is no need for CEQA review. The distinction between the two categories is sometimes

difficult, and in cases where aspects of both are involved, the project is usually treated as "discretionary" and would require a CEQA review.

B. Exemptions

After an agency determines that its activity is a discretionary project which may have some adverse impact on the environment, the lead agency then must determine if the project is exempted from CEQA. A project may be exempted from CEQA review if it does not have the potential for harming the physical environment at the project site or the surrounding area. A project which has been determined to be exempted from CEQA does not require any further environmental review.

CEQA exempts the following:

1) Activities which do not meet the definition of a "project";[53]

2) Certain categories of projects, as determined by the California legislature.[54] These statutorily-exempted projects include: "ministerial" projects to be carried out or approved by public agencies, demolition permits and various licenses.

3) Certified regulatory programs where an environmental review process similar to the Environmental Impact Report ("EIR") is

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[53] CEQA Guidelines § 15378.

[54] CEQA Guidelines § 15260.

already required; or categorically-exempt classes of projects with no potential for significant effect on the environment.[55]

Some examples of categorically-exempted projects include:

* minor modifications to existing buildings or facilities, such as the addition of health or safety features;

* maintenance of existing landscaping and water supply reservoirs, maintenance of fish screens and protective devices;

* demolition of individual small structures (except those of historical value);

* minor repairs or alterations to existing dam structures,

* conversion of a single family structure to office use;

* water main and sewage and other utilities to benefit residential construction;

* creation of bicycle lanes on existing rights-of-way;

* actions by regulatory agencies for protection of natural resources and the environment;

* sales of some surplus government property (subject to broad limitations);

* minor land divisions in urbanized areas; [56]

* actions creating or protecting or preserving lands for environmental purposes.

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[55] CEQA Guidelines § 15061, Article 19, § 15300 et seq.

[56] CEQA Guidelines § 15315.

Although the statutory and categorical exemptions exclude many types of projects from CEQA review, some projects may not, in fact, be exempted from CEQA even though they might otherwise fall within a categorical exemption. In that case, the categorical exemption would not apply and the project is subject to CEQA review.[57] There are five situations in which this might occur:

1) the project presents unusual circumstances which indicate a reasonable possibility of a significant environmental impact;

b) the project poses significant cumulative impacts (i.e. the project's impacts, when added to those from past, present and future projects in the same area, are significant);

c) the project site has been designated a sensitive environment;

d) the project poses possible impacts on scenic resources along designated state scenic highways; and

e) the project site is a listed toxic or hazardous waste site.

Also, the particular factual circumstances of a project may prevent the application of an exemption. For example, the construction of a single-family residence normally does not require CEQA review. However, that single home may require the extension of a sewer line or the construction of a public road. These additional improvements may then lead to other construction or development in the area. The impact of the single family home is thus

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[57] CEQA Guidelines § 15300.2.

broadened, so that the potential for environmental impacts is increased. Therefore, such a project may require CEQA review in order to evaluate all of its potential impacts on the environment.

After the lead agency determines the project is exempt from CEQA review and has approved the project, it may issue a Notice of Exemption ("NOE"). It is important to note that the agency is not required to issue a NOE. But if it does, at a minimum the NOE must include a description of the project along with a finding and an explanation why the project is exempted from CEQA. Once issued, the NOE will be filed where the public can review it. A filed NOE must remain posted for 30 days. If the lead agency is a local agency, the NOE is filed with the county clerk. When the lead agency is a state agency, the NOE is filed with the Office of Planning and Research.[58] Filing an NOE shortens the time period during which the project is subject to a challenge in court, and is usually considered advantageous to the applicant.

If you believe that a particular project may create potential harmful impacts on the environment and want to challenge an agency's determination that the project is exempted from CEQA, you must do so within a specified time period (this is also known as "statute of limitations"). If an NOE has been filed

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[58] The California Office of Planning and Research is located at 1400 Tenth Street, Room 150, Sacramento, California 95814, and may be reached by calling (916) 322-3612.

and posted, a person challenging the decision must file a lawsuit within 35 days. If an NOE has not been filed, the challange must be brought within 180 days. If a written request for a copy of the NOE is made during the 30-day posting period, a legal challenge to the agency's determination must be made within 35 days of the mailing of the NOE.

IV. IDENTIFYING POTENTIAL ENVIRONMENTAL EFFECTS

After a project is found to be discretionary and non-exempt, the public agency must analyze the project for its potential harmful environmental effects or impacts. The agency's preliminary review can have two possible outcomes; it can find:

* No significant environmental impacts, or
* Possible significant environmental impacts requiring an "initial study."

If the public agency determines that the project would not cause any significant environmental impacts, it is not required to conduct any further review. If, on the other hand, the agency determines that the project has the potential to cause a "significant effect," the agency is required to conduct further review called an "initial study."

A. Making Threshold Determinations on "Significant Effects"

During the preliminary review, a public agency should determine that a proposed project may have a significant effect (and conduct an initial study) when there is a potential physical change to the environment resulting directly or indirectly from the project which has the potential to degrade the quality or curtail the range of the environment. Examples of such impacts include substantially increasing air pollution or water pollution; increasing traffic and congestion; reducing the habitat of a fish or wildlife species; causing a fish or wildlife population to drop below self-sustaining levels; threatening to eliminate a plant or animal community; or eliminating important historical landmarks.

A project may also create significant cumulative impacts when its effects are considered together with those of past, current or future projects in or around the project area. A project's impacts may also be deemed significant if its environmental effects will cause substantial adverse public health and safety effects on human beings, either directly or indirectly.

CEQA Guidelines also recognize significant effects where a physical change to the environment, resulting directly or indirectly from the project, may:

* affect air or water quality;
* induce substantial growth or concentration of population;

* substantially affect a rare or endangered species of animal or plant life or affect the habitat of either;

* introduce new flora or fauna;

* substantially increase the ambient noise levels for adjoining areas;

* affect soils by contamination, erosion, etc.;

* create light and/or glare which may be substantial;

* disrupt unique geologic features;

* expose people or property to physical hazards such as earthquakes, mudslides, or other geologic hazards;

* create objectionable odors; or

* affect transportation or other public services.

When experts disagree over whether or not a project's environmental impacts are significant, a CEQA review usually will be required if there is substantial evidence supporting both sides of the dispute. In such cases, an EIR is required since one of the main reasons for a CEQA review is to resolve reasonable parties' conflicting views of likely environmental damage.

During the preliminary review period, community groups and local residents can submit to the lead agency evidence, such as public comments and testimonies, regarding whether a particular project may cause significant adverse impacts. This evidence could be based on relevant personal observations and

experience with similar projects which caused impacts. For example, in considering whether a proposed mining operation would impact the environment, local residents could offer their knowledge on how existing mining operations in the same area have impacted residents and their community, with regard to such issues as traffic, noise or air pollution. Local residents and community groups usually have important first-hand knowledge about the environmental setting where a project is to be located, and how they are likely to be impacted by a new project in the area.

B. The Initial Study

After the preliminary review, if a public agency finds that a project has the potential to cause a significant impact, the agency must perform an initial study. The initial study serves several purposes: it identifies the potential environmental impacts; enables modification of a project through mitigation efforts; focuses subsequent environmental reports on effects determined to be significant; facilitates an early assessment; eliminates the need for subsequent environmental reports; and provides supporting documents for other agency efforts.

An initial study must contain certain information: a description of the project; names of parties who prepared or participated in the initial study; a

description of the environmental setting; an identification of the project's potential environmental effects; an assessment of these effects; a discussion of ways to mitigate the significant effects identified; an evaluation of the project's compatibility with applicable land-use controls and zoning ordinances; and a recommendation for the type of further environmental documents that are to be prepared.

Based on the initial study, the agency must determine whether the project will require a full environmental study or that a declaration of no significant impacts (known as a "Negative Declaration") will be sufficient. The initial study also identifies the significant environmental effects to be analyzed in the EIR.[59] Section 21083 of the California Public Resources Code directs a public agency conducting an initial study to find that a project may present a significant effect on the environment under particular circumstances. Specifically, the agency is directed to find that a project has a potential significant impact on the environment when it will degrade the quality of the environment or curtail its range; result in considerable cumulative impacts; or when there are substantial adverse effects on humans, whether directly or indirectly.

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[59] Cal. Public Resources § 21083; CEQA Guidelines, 14 Cal.Code Reg. § 15064 and Appendix G.

If, following the initial study, the agency concludes that the project will have significant effects on the environment, the project applicant may modify the project by incorporating mitigation measures to reduce or eliminate the significant effects identified by the initial study. In this case, the project would then qualify for what is called a "Mitigated Negative Declaration," which is described in more detail below. If there are no significant environmental impacts, the applicant would qualify for a "Negative Declaration" from the lead agency.

C. No Significant Environmental Impacts

A "Negative Declaration" may be prepared by a lead agency if it finds, based on the initial study, that the proposed project will not have any significant impacts on the environment. This document must describe the agency's reasons why the project will have no such impacts. It must include the following information: a brief description of the project; location for the project site and name of applicant; the proposed finding that the project will not have a significant effect on the environment; an attached copy of the initial study and supporting evidence for the study; the mitigation measures to be taken, if any; and a statement that no environmental impact report ("EIR") will be prepared.

Once the lead agency decides to propose and adopt a Negative Declaration, public notice must be given of the agency's proposed adoption. This public notice must also identify a public review period of at least 21 days. During the public review period, the public may comment on the Negative Declaration's findings and the initial study. In order to be effective, the public notice must specify:

* a reasonable time for public review, generally a minimum of 21 days;[60]

* the date, time, place of public meetings, if any, on the project;

* a description of the project and its location; and

* the address where the Negative Declaration will be available for inspection.

Public notice of the agency's proposed Negative Declaration must be given to all organizations and individuals requesting such notice and other concerned agencies, including those with jurisdiction over the natural resources affected by the project. The notice must be provided in at least one of the following means: 1) publication in a newspaper of general circulation in the area affected by the proposed project; 2) a posted notice on and off the project's proposed site; or 3) mailed directly to those owning or occupying property

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[60] CEQA Guidelines § 15105.

contiguous to the project. If the proposed project involves the burning of municipal wastes, hazardous waste, or refuse-derived fuel, there are special notice requirements that must be followed.[61]

As mentioned earlier, a Negative Declaration can also come in the form of a "Mitigated Negative Declaration". A Mitigated Negative Declaration may be prepared when it is possible for the project applicant to modify the project design so that the possible significant impacts are mitigated or reduced. Substitutions for mitigation measures identified in the Initial Study may subsequently be made where the lead agency decides that the originally-proposed measures were infeasible or undesirable. Such substitution will not cause a mitigated negative declaration to be recirculated if the mitigation measures substituted are equally effective, or more effective, in mitigating an identified significant environmental effect.

A mitigated negative declaration has the same contents and notice requirements as a Negative Declaration. The two documents are therefore essentially the same; the only difference being that the mitigated version identifies adverse environmental impacts of the project which can be corrected while the other finds that there are no significant environmental impacts from

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[61] See, Public Resources Code § 21092(c).

the proposed project. In either case, both documents trigger the beginning of the public review period.

The public review period is the public's opportunity to become directly involved in the agency's review process of the proposed project. Public review is meant to allow for the sharing of expertise, disclosure of agency analyses, review of agency documents for accuracy, discovering public concerns and soliciting project alternatives.

Comments from the public should address any potential inadequacy in the agency's preparation of the Negative Declaration, and should be well supported with substantiating evidence to the extent possible. This means that in explaining their position, community residents should include the basis for their comments, as well as any supporting facts and references. For example, a public comment regarding air emissions from a power plant might include information from environmental reports on how air quality is affected by the power plant or health hazards from increased air pollution. By providing some factual information to support a comment, it will be more difficult for an agency to brush aside the comment as mere opinion or bias, and may encourage the agency to seriously address the issues raised.

Public comments on a proposed Negative Declaration should focus on the proposed finding that the project will not have a significant effect on the environment. For example, the Negative Declaration should be carefully reviewed to be sure all potential environmental impacts have been identified. If there are potential significant effects which have not been addressed, you should (in writing if possible) identify these effects, explain why you believe the effects will occur, and explain why you believe the effect would be significant.

Additionally, community groups and local residents may wish to focus on the adequacy of the scope of the agency's analysis. Perhaps the analysis was too narrow because it failed to consider economic and social factors or cumulative effects. The Negative Declaration will then be considered for approval by the local agency's decision-making body, usually the local planning commission if a city or county is the lead agency. The decision-making body must consider the Negative Declaration along with all the comments received during the public review process.

Once the Negative Declaration is approved, a "Notice of Determination" ("NOD") must be filed. If a local agency is serving as lead agency, it must file the NOD with the county clerk's office in the county where the project will be

located. This document gives notice of the agency's decision to carry out a project for which a Negative Declaration was approved.

The NOD must contain a brief description of the project, its common name and location, date of approval, statement that the Negative Declaration complied with CEQA, statement whether the project as approved will impact the environment, and the address where the Negative Declaration and the entire record of the project may be reviewed.

Once the NOD is filed, this marks the beginning of the 30-day statute of limitations period. This is a limited period of time during which the agency's decision is subject to legal challenge. The NOD must be filed within 5 days of the agency's decision to approve the project. If the NOD is not filed within 5 days of approval, the statute of limitations is automatically extended to 180 days. It is during this statute of limitations period that the agency's decision to approve the project is open to challenge.

The approval of a properly-prepared Negative Declaration, along with adequate public notice, will end the CEQA process for the project in question. Similarly, the same is true for a properly-prepared and noticed Mitigated Negative Declaration.

D. Significant Environmental Impacts

If the initial study reveals the possibility of a significant environmental impact, the lead agency must prepare a draft Environmental Impact Report (EIR). The first step in drafting the EIR is notice of the agency's decision to prepare an EIR. This is called a Notice of Preparation ("NOP"). This notice must be sent to all responsible agencies and any interested organizations or individuals requesting such notice.

The purpose of the NOP is to allow these agencies and organizations to provide guidance as to the scope of the EIR and identify issues that need to be reviewed. The NOP must contain enough information to allow other agencies to make meaningful comments on the proposed project. Usually this means a description of the project; the location of the project shown on an attached map or described by street address; and the probable environmental effects of the project. The public and responsible agencies will have 30 days to review the NOP.

Public responses to the NOP help to focus the EIR inquiry by pointing out environmental effects or the extent of certain impacts which may not have been fully discussed up to this point. The responses will be used to shape the issues

to be addressed in the EIR.[62] The lead agency has the job of evaluating the comments made during the comment period and responding to these comments in writing. Once completed, the lead agency will prepare the Draft EIR.

V. ENVIRONMENTAL IMPACT REPORT

The Environmental Impact Report ("EIR") is a 2-step process involving a draft EIR and a final EIR. The EIR is important and often considered the heart of the CEQA process. It provides the clearest notice and greatest opportunity for public comment in the CEQA process. It should be a comprehensive evaluation of the potential environmental impacts a project may have on a particular site and the surrounding environment. It should thoroughly examine the site for historical, geological, biological, hydrological, cultural and aesthetic values and should evaluate the project's likely impact(s) on those values.

Where potential significant impacts have been identified in the preliminary studies and the record shows there is substantial evidence to support the argument that the project may have significant impacts, the lead agency must prepare a draft EIR.

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[62] CEQA Guidelines § 15375.

The draft EIR's focus is on disclosing the project's potential environmental impacts, proposing mitigation activities for any adverse environmental effects, and suggested alternatives to the project. Alternatives can include other locations, processes, modified building plans which could accomplish the project objectives and reduce or eliminate the potential harmful effects. Mitigation measures include activities which could offset or substantially lessen the identified harmful impacts of the project on the environment. This information then allows decision makers to review the project with an adequate base of knowledge and the public can meaningfully participate in the CEQA process.

The draft EIR must contain the following information:

* a table of contents or index;

* a summary identifying significant effects, proposed mitigation, alternatives and areas of controversy;

* a project description, with project boundaries shown on an included map;

* the project's environmental setting and its conformity with applicable land-use plans (both local and regional);

* specific environmental impacts expected during all phases of the project, along with proposed mitigation measures and alternatives and effects which can not be avoided;

* an explanation of effects found to be insignificant;

* potentially controversial aspects of the project so that adequate public review can address all such issues;

* social and economic effects of the proposed project where these factors cause secondary physical impacts on the environment;

* potential cumulative impacts, including growth-inducing impacts;

* discussion of the relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity; and

* identification of all parties who participated in the preparation of the draft EIR.

Once the draft EIR has been prepared, a Notice of Completion must be filed with the state clearinghouse in the Office of Planning and Research. The lead agency must notify all interested parties (responsible agencies and organizations and those requesting such notice) of the draft EIR's availability. The Notice of Completion must include a description of the project, its proposed location, and the address where the draft EIR can be acquired and the period of public review. The Notice must also be published either in a local newspaper or posted around the proposed project site or mailed to property owners located near the proposed project site.

The period for public comment will be a minimum of 30 days unless the project has regional environmental impacts. In that case, the minimum public review period for a draft EIR is 45 days. Community groups and local residents

who wish to submit public comment should focus on how well the draft EIR identified and analyzed the possible impacts the project may have on the environment and on ways to avoid or mitigate any significant effects. It is especially valuable for the public to propose alternatives or mitigation measures that would provide better ways to avoid or mitigate the significant environmental effects of the project.

As with Negative Declaration review, the draft EIR public review is meant to allow for the sharing of public expertise, disclosure of agency analyses, checking for accuracy, discovering public concerns and soliciting project alternatives. Public hearings may also be conducted during the public review period but they are not required under CEQA.

When submitting public comments on a draft EIR, you should include the basis for your comments, as well as any supporting facts and references. This background material will give more substance to the comments and make it more difficult for an agency to brush aside the comments as mere opinion or bias. The CEQA Guidelines list of "significant effects" should serve as a checklist of the kinds of impacts considered likely to require a full-blown EIR under CEQA.

If the proposed project may produce one of these effects, public comments should be written and should include not only the listed effect, but any and all facts supporting the claim. This is especially important in the CEQA process since all comments and other documents become what is called the agency 'record'. Anything that is not a part of the "administrative record" cannot be considered by the decision-makers. Decisions are based solely on a review of the information which is contained in the agency's record. Therefore, in order to be considered, your comments must be in the administrative record.

Fact-based public comments pose the most solid challenges to project proposals, since the lead agency is only obligated to look for "substantial evidence" in the "record as a whole". Substantial evidence refers to facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts which substantiate a particular position. Speculation, unsubstantiated opinion, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment, or fears alone are not considered substantial evidence.

Where an agency proposes mitigation measures to avoid or minimize a project's potential environmental impacts, community groups and local residents may want to insure that specific mitigation measures, such as monitoring, are

included in the draft and final EIR. Adequate public oversight can then help ensure compliance with mitigation requirements.

CEQA requires the lead agency to respond in writing to all significant environmental issues raised during the public review period. The agency's responses to public comments may be in the form of revisions to the draft EIR, or as changes to the final EIR. However, unless the issue is significant, the most common method of responding is "Comment Noted."

CEQA requires that the final EIR show a good faith attempt by the lead agency to fully disclose the environmental impacts of the proposed project, thus allowing decision-makers to arrive at sound environmental decisions. The contents of the final EIR must include a copy of the draft EIR, comments and recommendations received on the draft EIR, the lead agency's responses to significant environmental concerns, a list of persons and organizations commenting on the draft, and any other information the lead agency may have added to the draft. CEQA does not require public review of the final EIR. CEQA does require that the lead agency certify the EIR was prepared in compliance with CEQA, and that project approval reflects the lead agency's independent decision making after due consideration of the final EIR. After the lead agency has certified the final EIR and adopted any necessary findings or

mitigation program, the final decision to approve the proposed project is left to the decision-making body within the agency.

The decision-making body of the agency is responsible for voting on whether to approve the project or not. If the EIR identifies any significant environmental effects from the proposed project, the project cannot be approved before the decision-making body makes "findings" for each of these significant effects. These findings should incorporate changes or alternatives to avoid the environmental effects identified and explanations why certain mitigation efforts are not feasible. The decision-making body then makes appropriate findings concerning the feasibility of reducing or avoiding significant environmental effects identified, and makes a decision on the project.

CEQA envisions agency rejection of projects which have potential environmentally-harmful effects that cannot be avoided or mitigated. Section 15092 of the CEQA Guidelines states that a project shall not be approved where an EIR has been prepared unless the project has no significant environmental impacts, or all such impacts have been eliminated or lessened, or the environmental impacts are unavoidable but acceptable due to overriding considerations.[63]

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[63] Cal. Public Resources Code §§ 21083, 21087.

In some cases, when the agency finds that the benefits of the project outweigh the environmental harm, the agency may allow the project to proceed without mitigating the harm. Under these circumstances, the lead agency must adopt a "Statement of Overriding Considerations" explaining why the impacts are acceptable, and the reasoning behind the decision. The use of this exception is limited to those cases where the benefits outweigh the costs. As a general rule, a project identified as potentially damaging should not be allowed to proceed unless the environmental harms can feasibly be avoided or mitigated, or if feasible project alternatives are available.

When the agency formally decides to approve or carry out the project, a Notice of Determination ("NOD") must be filed. The NOD must include the following information: project name and location, description of the project, date the project was approved, statement whether the project as approved, will have any significant environmental impacts, statement that the EIR was prepared in compliance with CEQA, statement whether mitigation measures are a condition of approval, address where the EIR may be reviewed, statement whether findings were made and statement whether overriding considerations were adopted. [64]

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[64] CEQA Guidelines § 15094.

The NOD marks the start of a statute of limitations period, a limited period of time during which the agency's decision to go forward can be legally challenged. The adequacy of the EIR can be challenged as well as the agency's approval of the project. This is generally 30 days from filing or posting; or 30 days from NOD mailing to those who have requested notice from the agency within the original posting period. If a NOD is not filed, then the statute of limitations period is 180 days.

If reviewed by a court, the 'rule of reason' will be applied in reviewing EIR preparation and adoption. If the agency shows that it has made an objective, good-faith attempt at full disclosure, the EIR will be found sufficient. The courts do not require perfection, and will not review the EIR for the correctness of its conclusions, but only as to its sufficiency as an informative document for decision-makers. If the review process produces significant new information, the draft EIR must be revised and recirculated.

Challengers must "exhaust their administrative remedies" before seeking judicial review of an agency's decision. The challenger must have made use of the agency's internal procedures thus, giving the agency decision-makers the opportunity to receive and consider the basis for the challenge. This means that any objections to the project's approval must be made during the public

comment period and/or prior to the close of public hearings on the project before the Notice of Determination is issued. The agency need not consider comments received after the close of public hearings, so failing to comment during the appropriate period could mean that the subsequent challenges to the project would have no legal effect, and could not be pursued in a later court challenge.

VI. NOTICE OF PROPOSED PROJECTS OR APPROVALS

In order to keep informed of agency activity, community groups and local residents can request to be on a mailing list to receive copies of a public agency's meeting agendas. Requesting the agendas of all the public meetings for a particular agency should allow you to monitor the meetings of both the appointed and elected bodies within the agency, and therefore learn what projects are being planned.

Another way you can stay informed is by reviewing notices which have been posted publicly. For example, notices are routinely posted in the office of the county clerk, at city or county offices of local public agencies, or at public libraries in the affected area. Also certain notices such as a Notice of

Preparation or Negative Declaration must be published in local newspapers and/or posted on and around the site of the proposed project.

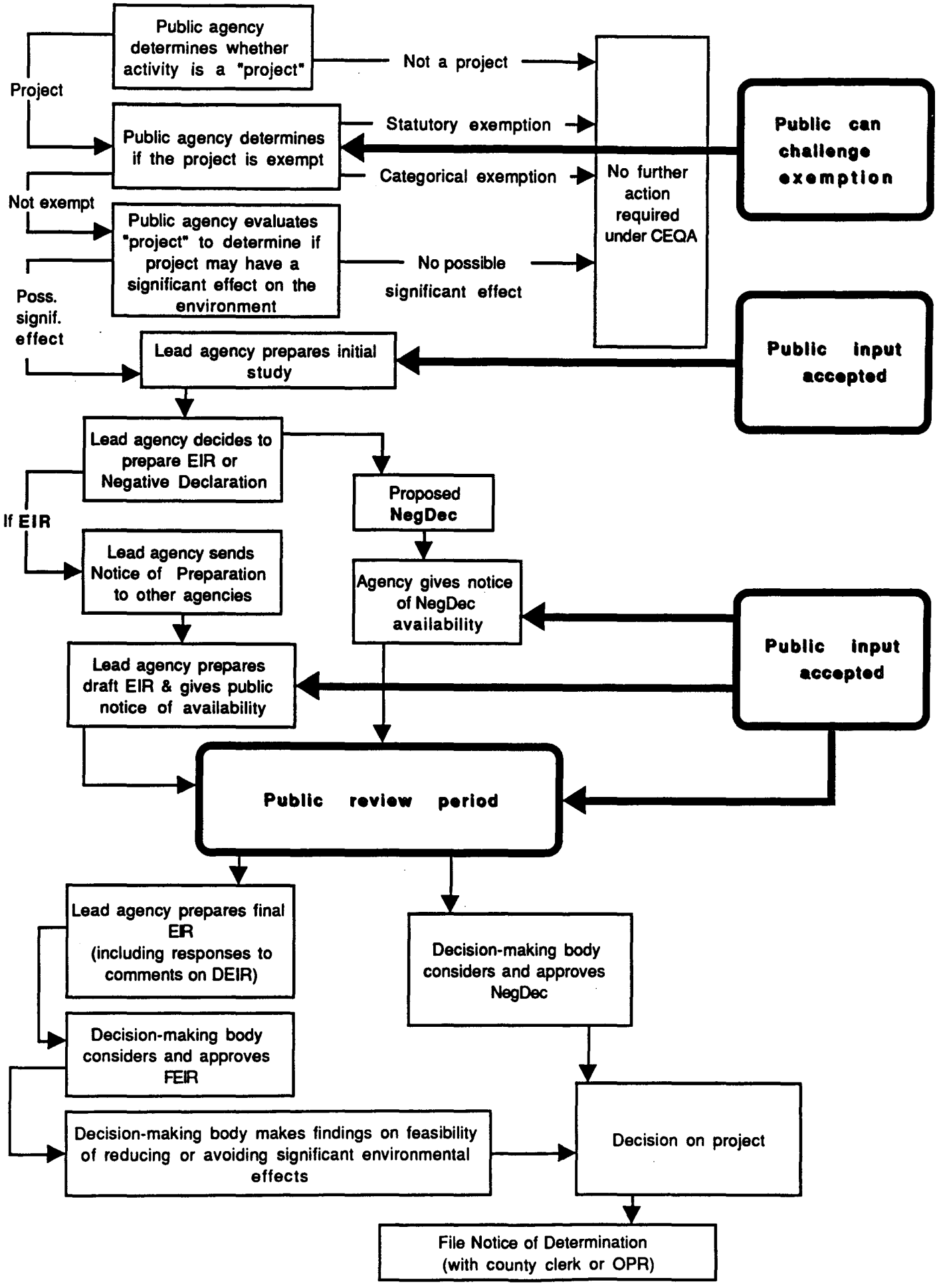
VII. EFFECTIVE PUBLIC COMMENT

Any member of the public with an interest in having the agency's public duty enforced can challenge, object to, or comment on a project under consideration, if done so in a timely manner. A court challenge can be brought at specific times in the CEQA process, when the challenger has fulfilled the necessary preliminary steps to a legal challenge. Generally any person (or entity) showing a "clear, present, and beneficial right" to performance of the agency duty has "standing" to seek judicial review.

Thus, if the agency's decision on a project does not reflect the challenger's timely, substantiated, pre-decision objections to the project, and appears to allow unmitigated, unexplained (or inadequately mitigated or explained) environmental harm, a local community group of residents, a taxpayer, property owner, citizen or elector who "establishes a geographical nexus with the site" of the project, may seek to challenge the project in court. Such a geographical nexus could be established by showing proximity of one's residence to the project, by having paid taxes in the area (property or sales tax,

for instance), or by using the natural resources which will be impacted by the project.

Expert opinions may be necessary where "significant effects" might depend on scientific information which could only be supplied by those well-versed in a particular field. Experts, or evidence generated by experts, can be very persuasive when presented by community groups. It is important to remember, however, that you do not need an environmental expert or lawyer to impact the environmental review process conducted by a public agency under CEQA. You have a right to participate in the decision-making process and express your concerns.


Public agency determines whether activity is a "project"
Not a project
Project
Public agency determines if the project is exempt
Statutory exemption
Categorical exemption
Public can challenge exemption
No further action required under CEQA
Not exempt
Public agency evaluates "project" to determine if project may have a significant effect on the environment
No possible significant effect
Poss. signif. effect
Lead agency prepares initial study
Public input accepted
Lead agency decides to prepare EIR or Negative Declaration
Proposed NegDec
If EIR
Lead agency sends Notice of Preparation to other agencies
Agency gives notice of NegDec availability
Public input accepted
Lead agency prepares draft EIR & gives public notice of availability
Public review period
Lead agency prepares final EIR (including responses to comments on DEIR)
Decision-making body considers and approves NegDec
Decision-making body considers and approves FEIR
Decision-making body makes findings on feasibility of reducing or avoiding significant environmental effects
Decision on project
File Notice of Determination (with county clerk or OPR)

CHAPTER 4

NATIONAL ENVIRONMENTAL POLICY ACT

I. INTRODUCTION

In 1969, Congress adopted the National Environmental Policy Act ("NEPA")[65] in response to public sentiment that federal agencies should play a greater role in protecting the environment. Similar to CEQA, discussed in the previous chapter, NEPA requires federal agencies to evaluate environmental impacts when planning and making decisions about projects, and ensures that environmental information is available to the public.

NEPA is an important statute because it provides opportunities to the public to participate in the decision-making process. Also, NEPA is important because it requires federal agencies to analyze the environmental consequences of projects and their alternatives, before approving and completing the projects. This "forward thinking" helps federal agencies to avoid and minimize adverse environmental impacts before committing their resources. NEPA promotes an interdisciplinary approach to evaluating projects and seeks to integrate science, as well as social and economic considerations, into the decision-making process.

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[65] NEPA may be found at 42 U.S.C. §§ 4321 et seq. NEPA's implementing regulations are set forth at 40 C.F.R. §§ 1500-1508.

NEPA contains several key elements: 1) it establishes the continuing policy of the federal government to use all practicable means to protect the environment; 2) it requires all federal agencies to prepare an environmental impact statement on major federal actions significantly affecting the environment; 3) it requires all federal agencies to propose measures that bring their policies into compliance with NEPA; 4) it requires that an annual Environmental Quality report be submitted to Congress; and 5) it establishes the Council on Environmental Quality and describes its duties and responsibilities.

II. ADMINISTRATION AND IMPLEMENTATION OF NEPA

A. Council on Environmental Quality

The Council on Environmental Quality ("CEQ") is responsible for general oversight of NEPA. CEQ's functions and duties include: gathering and evaluating information to evaluate our nation's environmental conditions and trends; assessing the federal government's programs in light of NEPA's policies; developing national policies to promote environmental quality; and conducting investigations and research relating to ecological systems and environmental quality.[66]

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[66] 42 U.S.C. § 4344.

In 1978, CEQ adopted regulations for the implementation of NEPA.[67] These regulations apply to all federal agencies, which must integrate and implement NEPA's requirements into their own policies and programs. Among other things, the NEPA regulations direct federal agencies to include an environmental review process when carrying out "major federal actions" that may significantly affect the quality of the environment. When federal agencies approve a new project, the project may be deemed a "major federal action" requiring the agency to conduct an environmental review process. This process is described in more detail in Section IV.

B. U.S. Environmental Protection Agency

Similar to other federal agencies, the United States Environmental Protection Agency ("U.S. EPA") must comply with the requirements of NEPA when it carries out "major federal actions." In addition, U.S. EPA reviews and comments on the environmental impacts of major actions taken by other federal agencies, including those covered by an Environmental Impact Statement ("EIS").[68] U.S. EPA also carries out certain administrative and operational responsibilities in connection with the EIS process.

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[67] CEQ'S regulations may be found at 40 C.F.R. §§ 1500.1 et seq.

[68] U.S. EPA was provided this authority by Section 309 of the federal Clean Air Act, 42 U.S.C. § 7609.

III. PUBLIC PARTICIPATION

Before describing NEPA's environmental review process for projects, there are some opportunities when local residents, community groups and environmental organizations can participate in the NEPA process. Under NEPA, federal agency officials are required to use diligent efforts to involve the public. Since many of these opportunities usually exist only within limited time periods, you should be aware that the timeliness of your participation is critical.

A. Public Comments and Hearings

Similar to the CEQA process, NEPA provides several opportunities for public participation. A member of the public can submit comments on a project during the initial environmental assessment period. If the agency determines that it should prepare an Environmental Impact Statements ("EIS") for a project, the public may also participate during the "scoping" phase and then provide comments on the project during review of the draft and final EIS.

There may also be public hearings conducted by a federal agency on an EIS for a particular project. Public hearings usually are not mandatory under NEPA. Generally, they are held whenever there is substantial controversy concerning a proposed action, whenever there is substantial interest in holding a

hearing, or whenever there has been a request for a public hearing by another agency with jurisdiction over the proposed action or affected region.

B. Public Notice

In order for you to participate, however, you must receive notice of the NEPA proceedings. An agency conducting a NEPA review process may give notice to the public in a number of ways. The exact method of publication will depend on the size and scale of the agency's proposed action. For example, an agency issuing a permit for a specific facility may provide notice to only those members of the community who have requested it. In such situations, notice may be given to: state and area-wide clearinghouses; native American tribes which are located in the area; local newsletters, papers or other local media; or community and business associations. There are no specific requirements provided by NEPA or its regulations that specify exactly how notice should be given for local matters.

When an agency is evaluating a large proposed action, such as one that may have national impacts or be of national concern, the federal agency is required to publish notice of the action in the *Federal Register*.[69] In addition, the federal agency must notify by mail any national organizations that could be

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[69] See Chapter 1 of Part I of this community guide for an explanation of what the *Federal Register* provides and how you can find it.

reasonably expected to be interested in the matter. Thus, a proposed action that would affect a national forest would require the federal agency to provide notice to national environmental organizations, such as the Sierra Club, as well as other groups which are expected to have an interest in such actions.

IV. NEPA'S ENVIRONMENTAL REVIEW PROCESS

A. Overview

NEPA's environmental review process is triggered whenever a federal agency undertakes a major federal action that may significantly impact the environment. For example, if a federal agency is issuing a Clean Air Act permit for a new hazardous waste incinerator project in your area, or is approving the development of a major regional gas pipeline through your town, the federal agency is most likely required to conduct a NEPA environmental review.

Similar to the CEQA process described in Chapter 3, the NEPA environmental review process involves several levels of analysis. The federal agency must first make a threshold determination on whether it is undertaking a "major federal action" that may "significantly affect the quality of the environment." These terms are discussed in the following sections.

After making a preliminary determination that NEPA may apply, the agency must determine if any categorical exemptions apply. NEPA's environmental review requirements will not apply to federal actions that are categorically excluded by regulation or exempted by Congress. If a project is not excluded, then the agency must prepare an Environmental Assessment ("EA"). The EA will have one of two possible conclusions: a finding of no significant impact ("FONSI") or a finding of significant impact. If no significant impact is found, the process ends. If the agency determines that the project may create significant impacts on the environment, it must then prepare an EIS.

The EIS is a more detailed description of the project and its alternatives. After a draft EIS has been completed, it is available for public comment and for review by other federal agencies. After receiving comments, the lead agency prepares a final EIS. It will issue a record of decision ("ROD") which explains its decision on the proposed project. The ROD will state what the decision is and identify the environmentally superior alternatives that were considered.

After the ROD has been issued, the agency may proceed with its proposed project or action. If a party wishes to challenge the NEPA decision-making process, it could do so by bringing a lawsuit in court.

B. "Major Federal Action"

NEPA's environmental review applies only to a "major federal action."[70] This term applies to actions that are administered, required or conducted by a federal agency, or that require the approval of a federal agency. Because NEPA applies to all federal agencies, even projects that are considered partially federal in nature may be subject to NEPA. NEPA may apply to state or local actions that require a federal permit, a regulatory decision, or funding from a federal agency. For example, NEPA has been found to apply to state or local water projects that require a permit under the Clean Water Act.

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[70] Pursuant to 40 C.F.R. § 1508.18, there are four categories of "major federal actions" which are covered by NEPA:

1) The adoption of official policy. These include rules, regulations, and interpretations of agency procedures and actions. Treaties, international conventions and agreements, as well as formal documents that will substantially alter agency programs are also within this category.

2) The adoption of formal plans, such as official documents prepared or approved by federal agencies which help determine alternative uses of Federal resources, upon which future agency actions will be based.

3) The adoption of programs. This applies to group actions to implement specific polices or plans, and systematic and connected agency decisions allocating agency resources to implement a specific statutory program.

4) The approval of specific projects, such as construction or management activities. Projects include actions approved by permit or other regulatory decision, as well as federal and federally-assisted activities.

Environmental review documents are seldom prepared for the first three categories identified above.

CEQ's definition of an "action" is extensive, including new or continuing projects, projects wholly or partially funded by federal agencies, projects that require any kind of federal approval (such as a permit), projects that will be regulated by a federal agency (with or without the requirement of a permit) and any new or revised agency rules, regulations, policies, or procedures, including legislative proposals.

C. "Significantly Affect the Quality of the Environment"

The word "significantly" as used in NEPA has a broad definition. It requires the agency to consider both the context and intensity of the proposed action.

1. Context

"Context" means that the significance of the proposed action must be analyzed from several different angles. For example, the significant effects must be analyzed as they pertain to society as a whole, the affected regional area, the affected interests, as well as the specific locality affected. Significance will vary with the environmental setting of the proposed action. It is important to note that both short- and long-term effects are relevant and must be considered.

2. Intensity

"Intensity" refers to the severity of impact that the proposed action will cause. Both adverse and beneficial impacts may occur, meaning that a significant impact may exist even if the federal agency believes that the effects will be beneficial. The agency must also consider the degree to which the effects on the human environment are likely to be highly controversial, highly uncertain, or involve unique or unknown risks. For example, a proposed action for the construction of a nuclear power plant might have effects that would be considered highly controversial or whose risks may be partially unknown. The agency must consider whether it is setting a precedent. In other words, it must consider whether its approval of a project will set the stage for approval of future projects with similar significant affects.

In determining significant effects, the agency must also look at whether the proposed action is related to other individual actions with insignificant effects because taken together, the actions may have significant cumulative effects. CEQ's regulations for NEPA state that "significance" exists if it is reasonable to anticipate a cumulatively significant impact on the environment from past, present, and reasonably foreseeable future actions, regardless of who is undertaking them.

For example, in a NEPA case involving timber sales, the court held that the construction of a forest road must be considered along with the reasonably foreseeable timber sales that would take place after the road was constructed.[71] The court said that to evaluate one project without the other would defeat the purpose of the EIS. A finding of "significant impact" cannot be avoided by breaking a project into smaller, individually harmless pieces.

The federal agency should also look to the degree to which the proposed action will affect the public health and/or safety. In addition, the unique characteristics of the geographic area should be considered. When looking at such characteristics, it is important for agencies to consider the proximity of the project to historic or cultural resources, prime farmlands, wetlands, park lands, wild and scenic rivers or ecologically critical areas.

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[71] Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985).

D. Categorical Exclusions

In conducting NEPA's environmental review process, a federal agency must initially determine whether or not the project or action is one which normally requires an EIS, or is covered by a categorical exclusion.[72] When federal agencies adopted regulations to implement NEPA, they included a list of categorical exclusions for certain categories of projects which they determined not to have any significant effect on the environment. Categorical exclusions usually cover projects that are routine, or small projects with minimal impacts.

For example, the Forest Service of the U.S. Department of Agriculture has listed internal organization changes, such as personnel actions, and routine, generally repetitive operation and maintenance operations, unless herbicides are involved, as two categorical exclusions. The Soil Conservation Service ("SCS") has included data gathering and interpretation programs as covered by categorical exclusions.

Even if a federal agency has listed certain categories of projects as excluded from NEPA, it must provide procedures to determine if an exception to the exclusion is appropriate in a given factual situation. In the case of extraordinary circumstances, an exclusion may not be appropriate. For example,

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[72] 40 C.F.R. § 1501.4(a).

when a normally categorically excluded activity may affect protected wetland areas or the habitat of an endangered species, the SCS will apply NEPA to the project notwithstanding the categorical exclusions provided in its regulations.

Certain projects may also be excluded from NEPA when there is an express exemption, conflict or emergency. Congress may also expressly exclude certain activities from NEPA. If a project is covered by a categorical exclusion or exempted from NEPA by Congress, the environmental review process ends.

E. Environmental Assessments

An agency is required to conduct an environmental assessment ("EA") for a major federal action when no categorical exclusion is applicable, or when the proposed action is not one that regularly requires an EIS. The EA will be used by the agency to determine whether the proposed action may "significantly affect the quality of the environment" and whether an EIS should be prepared.

CEQ's regulations require the federal agency to include the public and other interested agencies in the process of preparing the EA. The agency must provide public notice of the completed EA. The form of notice will depend on the agency involved and on the project in particular. For example, the Bureau of Land Management ("BLM") allows the responsible federal official for each proposed action to use his or her discretion as to what extent the public is to be

involved in the process. BLM often provides notice to the public by conducting press conferences and periodic briefings. The local BLM offices also maintain lists of interested parties in particular actions.

For most agencies, when a local project is involved notice may be given by publication in a local newspaper. At the very least, an agency must make the EA available to the public upon request. This means that if you find out about or are interested in a proposed project, you should request a copy of the EA from the relevant federal agency.

The EA must discuss the need for the proposed project, any feasible alternatives to the proposed project, and the impacts that the project and any alternatives are expected to have. When an agency determines that an EIS is not required, it must prepare a finding of no significant impact ("FONSI"). If, on the other hand, the agency finds that a project may cause significant impacts to the environment, it is required to prepare an EIS.

F. Finding of No Significant Impact

A FONSI is very critical and will end the NEPA process. The FONSI must provide sufficient evidence that there will be no significant effect on the human environment. There must be supporting data and references that demonstrate this negative determination. The report must also state the relevant

facts considered and which factors were weighted most heavily. The EA must be attached, summarized or incorporated into the FONSI.

The FONSI should also be made available to the public in the same manner as the EA. There are no CEQ regulations that specifically address this public notice requirement; however, at a minimum, an agency must make the FONSI available to whomever requests it.

Under certain circumstances, the FONSI must be made available to the public for a 30-day review period before an agency's final determination of whether to prepare an EIS. This is required in borderline cases, i.e., when there is a reasonable argument for the preparation of an EIS; when there is scientific or public controversy over the proposed action; when the proposal involved is closely similar to the kind which usually requires an EIS; or when the proposed action is new, unusual, or a precedent setting case, i.e., a first intrusion of even a minor development into a pristine area.

If there is a finding of significant impact, an EIS will be required for the proposed action. For an action to significantly affect the environment, there must be a causal relationship between the action and the impact on the environment. In other words, the proposed action must be the cause of a particular impact on the environment. The impacts can be direct, indirect or cumulative.

G. Environmental Impact Statements

The EIS is the central part of the NEPA environmental review process. NEPA requires agencies to prepare a comprehensive document that thoroughly analyzes all of the different environmental aspects of a proposed action. If the agency determines that an EIS is necessary, it must publish a notice of intent ("NOI") that an EIS will be prepared. This NOI must include a description of the proposed action and a description of the agency's proposed scoping process, including any meetings that will be held on the topic. The scoping process is conducted early on in the EIS process and is an open process to determine the scope of the issues to be addressed and the significant issues related to the proposed action that need to be covered by the EIS.

After the scoping has been completed, the agency prepares the EIS. Once the draft EIS has been completed it is made available for public comment. A notice soliciting comments from other federal agencies, the public, affected parties, and from any applicants is published by the agency in the *Federal Register*. After the comment period, the agency responds to comments, makes revisions to the EIS, and puts the EIS in final form. The final EIS is then submitted to the agency for final approval.

H. Record of Decision

A Record of Decision ("ROD") is written by the federal agency after the final EIS has been submitted. However, no decision may be made until at least 90 days after publication of the availability of the EIS. Publication is in the *Federal Register*. Depending on the size and scope of a project, there may also be publication on a local level. This allows the public and interested federal agencies ample time to review the completed EIS before a decision is made on the proposed action.

The ROD is a written public document. It must fully explain the agency's decision and give the factors considered by the agency in making the decision. Additionally, the ROD must explain which alternatives were considered and those that were found to be environmentally preferable. There must be an explanation of the mitigation measures adopted, and if mitigation measures were not adopted, an explanation of why not. A report of the monitoring and enforcement program for any adopted mitigation measures will also be included.

The underlying purpose of the NEPA process is to insure that federal decision makers take environmental consequences into account when deciding the outcome of a specific action. The EIS must be carefully considered when an agency decision is made. It is not enough for the agency to simply prepare an

EIS in order to meet the NEPA requirements and then not consider the document when it is making its final decision.

There are no specific requirements for publication of the ROD. However, some agencies publish their RODs in the *Federal Register*. Because the ROD is considered a public document, it must be made available to the public. If the proposed action involved is of local concern notice would probably be in a local or regional paper. CEQ has not identified any requirements or guidelines for public comment on the ROD. For example, when the Soil Conservation Service issues an ROD, it circulates it to a list of interested parties; however, notice of the ROD is usually not published. Once the ROD has been completed and accepted, the agency may go forth with the action.

I. NEPA Is Considered A "Procedural" Statute

It is important to note that NEPA's environmental review process has been regarded by the Supreme Court as "essentially procedural."[73] Even though NEPA requires federal agencies to consider all aspects of impacts on the environment before making a decision, they do not necessarily have to adopt the environmentally preferable alternatives identified in the EIS. "Other statutes may impose substantive environmental obligations on federal agencies, but

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[73] Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).

NEPA merely prohibits uninformed - rather than unwise - agency action."[74] This means that an agency is not required to adopt the alternatives and mitigation measures outlined in an EIS, although they may be preferable and offer greater environmental protection. This does not mean that an agency may fully ignore what has been presented in the EIS when making a decision on a proposed action. In the ROD, the agency must show that it has taken a "hard look" at the alternatives presented. In addition, the agency may only choose from alternatives that have been analyzed in the EIS.

V. CHALLENGING NEPA DECISIONS IN COURT

NEPA does not provide any express enforcement provisions and neither CEQ nor U.S. EPA have direct enforcement authority against other federal agencies for non-compliance with NEPA. Accordingly, individuals, community groups, environmental organizations and state and local governments have used the courts as a primary enforcement mechanism for NEPA.

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[74] Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).

A. Common Types of NEPA Lawsuits

Courts have been reviewing NEPA cases since the statute was first adopted more than twenty-five years ago. The first NEPA lawsuits established precedent for future interpretation of NEPA actions. These cases gave deference to CEQ guidance and regulations, and they required good faith efforts by federal agencies to comply with NEPA's full disclosure objectives.

Current NEPA litigation often focuses on the adequacy of the NEPA process. Often, a NEPA lawsuit is filed because an agency prepared an inadequate EA or EIS, or failed to prepare an EIS when one should have been prepared.[75] Almost half of the NEPA cases litigated in 1990 involved inadequate EIS's. The majority of these cases are being brought by individuals, community groups and established environmental groups.

B. "Standing"

Similar to other lawsuits, a plaintiff bringing a claim under NEPA must show that he or she has an actual or threatened injury caused by an agency's action that is not in compliance with NEPA. This injury needs to be "redressible," which means that a favorable remedy in court will stop or fix the injury. The injury cannot be generalized or solely economic. The plaintiff must

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[75] CEQ, *Twenty-Second Annual Report of the Council on Environmental Quality* (1991).

be bringing the action in his own interest and the interest must be one which NEPA is intended to protect. This requirement of "standing" must be met anytime an action is brought in court.

C. Role of the Courts

In NEPA lawsuits, courts are often asked to determine whether an agency has taken a "hard look" at the environmental consequences of a proposed project. The court does not have to agree with the course of action an agency has chosen, so long as there is evidence that these consequences were analyzed. NEPA only requires that the agencies consider the environmentally preferred alternative and mitigation measures, not adopt them.

D. Standards of Review

In determining whether an agency failed to prepare an EIS in violation of NEPA, the courts have adopted an "arbitrary and capricious" standard. This standard of review is highly deferential to the agency's decision. The courts will only reverse an agency's NEPA decision if it finds that the agency was arbitrary and capricious when making its determination. This same standard applies for the failure to prepare a supplemental EIS.

Courts use a "rule of reason" when determining if the EIS is inadequate. Under this standard, there must be sufficient information in the EIS for the

public to review and evaluate it, and for the agency to make a reasonable decision based on all of the environmental factors involved.

E. Remedies

When an action is challenged in the courts because it violates NEPA, a plaintiff may seek a wide range of remedies, including an injunction to stop a project, declaratory relief and recovery of attorney's fees and expenses. Often, plaintiffs will seek a preliminary injunction to stop a federal agency from taking any further action or allowing a project to go forward until the requirements of NEPA are met.

Courts may also award attorney's fees to the plaintiff if he or she prevails. The courts may grant declaratory relief to establish the agency's legal obligation under NEPA. There is no award of monetary damages in NEPA actions.

VI. COMPARING CEQA AND NEPA

Many states have enacted environmental statues that are patterned after NEPA. As explained in Chapter 3, California has a similar environmental statute, called the California Environmental Quality Act ("CEQA"). CEQA requires the preparation of an Environmental Impact Report ("EIR"), which is an environmental information document similar to NEPA's EIS.

CEQA differs from NEPA is several respects. CEQA is applicable to state, regional and local agencies; NEPA is applicable to only federal agencies undertaking major federal actions. CEQA focuses primarily on a project's environmental impacts, and allows consideration of other factors, such cultural and socio-economic impacts, but only insofar as they indirectly affect the environment. NEPA is somewhat broader and urges federal agencies to focus on both the natural and physical environment and the relationship between people and the environment.

Moreover, CEQA establishes a duty on public agencies to avoid or minimize environmental damage. It requires agencies to adopt the most environmentally favorable alternative whenever feasible, and to implement all mitigation measures unless they are infeasible or justified by overriding social, economic or other considerations. In contrast, NEPA requires an analysis of alternatives and mitigation measures as part of the EIS process, but does not require agencies to actually adopt any alternatives or mitigation measures that are preferable or superior with regard to environmental protection.

VII. CONCLUSION

In conclusion, NEPA is an important environmental statute because it provides opportunities for the public to participate in the decision-making process. NEPA provides important environmental information to the public in the form of several documents, such as an EA, EIS and ROD. By participating in the NEPA review process, you can voice your concerns. We hope you can use this information about NEPA to fight against the potentially adverse impacts of major federal actions on your environment, health and community.

CHAPTER 5

SUPERFUND TECHNICAL ASSISTANCE GRANTS

Under the Comprehensive Environmental Response, Compensation and Liability Act (also known as "Superfund" or "CERCLA"),[76] a trust fund was established to provide money for cleaning up hazardous waste sites in the United States. This fund is commonly known as "Superfund."[77] While it is the goal of the Superfund program to clean up all hazardous waste contamination sites, the U.S. EPA has published a National Priorities List ("NPL") which identifies the most serious sites where hazardous wastes are located. Anyone may obtain a copy of the NPL by contacting the U.S. EPA regional offices.

People who live near these NPL sites have a special interest in the clean-up process because the sites pose the greatest threat to those living nearby. Congress recognized the unique position of those living nearby and their desire to understand the problems presented by the site and participate in the clean-up plan decision-making. In order to promote this public involvement, Congress established a Technical Assistance Grant ("TAG") program.[78]

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[76] 42 U.S.C. §§ 9601 et seq.

[77] See, 42 U.S.C. § 9611.

[78] 42 U.S.C. § 9617(e); 40 C.F.R. Part 35.

Under the TAG program, qualified groups may apply for funds in order to hire an independent consultant to provide them with expert advice, understandable information, and an analysis of the technical issues surrounding the clean-up of a "Superfund" facility identified on the NPL. Generally speaking, a grant may be available "to any group which may be affected by a release or threatened release at any facility which is listed on the National Priorities List". A group that is successful in applying for a grant my use the funds to pay a technical advisor to:

* attend meetings related to the site clean-up;
* review documents related to the site;
* interpret and explain technical information to the group; and
* assist the group in presenting their concerns about the site at public hearings.

Usually, a group of residents living near the "Superfund" site is eligible to receive a grant. However, the group must demonstrate that the health, economic interests and rights of enjoyment are threatened by the hazardous site. The group must also be incorporated (or in the process of becoming incorporated) and operate as a public benefit, non-profit organization in order to receive a grant.

If there are several concerned community groups in the area, the formation of a coalition may be necessary because only one TAG may be awarded per "Superfund" site. Where competing groups apply for a TAG, each group will be evaluated according to the following factors:

* ability to manage the grant in a way that complies with legal requirements;
* broad community representation;
* the group's commitment, dedication, and resources; and
* the degree of adverse impacts from the site on the group.

The highest grant amount which can be awarded to a community group is $ 50,000. An exception can be made to this rule, but this will depend on the group's goals, funding availability and whether the additional funds are necessary to carry out the purposes of the law. The grant may also be renewed in order to continue public participation at all stages of a clean-up action.

Once the grant is awarded, the group must meet specific guidelines before its costs will be reimbursed. For example, grant money may not be used to fund any legal action or do additional site sampling. A complete list of eligible expenditures is included in the application packet provided by U.S. EPA.

Furthermore, the TAG program is a matching grant program. That means that a technical assistance program is not funded 100% by the government. The

costs of the program are shared between the Superfund and the community group's own resources. As a condition of the grant, the community group must contribute at least 20% of the total costs of the technical assistance program. TAG money can be used to pay for the remaining 80% of the program's costs.

The 20% contribution requirement often can be met by group member contributions of time, supplies, or professional services. For example, group members may satisfy the matching requirement by donating skills such as accounting services to manage the grant, clerical skills to prepare reporting requirements of the grant, or writing and editing work to produce a group newsletter. Also, if the group demonstrates a financial need, the 20% contribution can be waived if the waiver is necessary to facilitate public participation.

Hopefully, this has provided you with a general overview of the TAG program under CERCLA. There are many legal requirements associated with applying for and managing a technical assistance grant. The U.S. EPA Region 9 office in San Francisco and your regional TAG Coordinator can provide more detailed information and assistance if you are considering applying for grant funds. In California, you can contact the EPA TAG Coordinator at:

U.S. Office of Environmental Protection
Region IX, Superfund Programs Branch
Community Relations Division
75 Hawthorne Street
San Francisco, California
(415) 744-1611

The U.S. EPA can provide you with a free TAG application package, including a copy of a publication, entitled *The Citizens' Guidance Manual for the Technical Assistance Grant Program.*

CHAPTER 6

STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION

I. INTRODUCTION

One of the most basic underpinnings of a democracy is public participation in the decision-making processes of government. This basic tenet is reinforced by our Constitutional guarantees of freedom of speech and the right to petition our government. Yet, expressing one's point of view on a public issue does present certain risks. For example, writing a letter to the editor on behalf of animal rights naming a fur manufacturer, speaking out at a city council meeting against a proposed development project, or protesting against a discharger's violation of the federal Clean Water Act could expose you to the risk of being sued. On the surface, the plaintiff of such a lawsuit may claim that a letter or speech somehow defamed his or her character or business. But the true purpose of the lawsuit is to frighten and silence community residents who dare to criticize or complain.

Because these types of lawsuits have become an increasingly common tactic, they have become known as "SLAPPs". SLAPP stands for "Strategic Lawsuit Against Public Participation." A SLAPP is a legal tactic used to

intimidate opponents. Although the great majority of these suits do not succeed in the courts, a SLAPP can still limit negative opinion or opposition to a project. The real success of a SLAPP is evidenced by its "chilling" effect on a person's exercise of Constitutionally protected rights. The mere fact of being named as a defendant in a lawsuit is often more than enough to "chill" or quiet any protest. The devastating amount of time, money and energy required to defend against a SLAPP is almost guaranteed to "chill" community-based campaigns.

At the same time that the SLAPP works to intimidate the speaker as a named defendant, it is also a warning to discourage others in the community from speaking out during the government approval process. Thus, the SLAPP serves two purposes: punishment for past or active opposition and a threat of retaliation for future complaints. The result is that the community activist who can promote good government and seek accountability from decision-makers is cut off before all the issues are fully discussed.

II. IDENTIFYING A SLAPP LAWSUIT

SLAPPs may be hard to identify because they are they are disguised as ordinary personal injury lawsuits. Most commonly the SLAPP defendant is sued for defamation. In a defamation action, the plaintiff claims that the defendant

has made damaging statements about the plaintiff which were false and the defendant knew or should have known they were false. If the statements were made orally, the complaint will be a slander action. If written or recorded remarks were used, the complaint will be a libel suit. A SLAPP may also be camouflaged as a lawsuit for intentional interference with prospective economic advantage, intentional interference with right to contract, nuisance, or intentional infliction of emotional distress. However the lawsuit is characterized, all SLAPPs are motivated by a power play designed to force community residents who protest to back down and drop their campaign.

III. CALIFORNIA'S ANTI-SLAPP LAW

During the years between 1970 and 1990, there was a steady rise in the number of SLAPPs filed. In recognition of the negative impact these increasingly common lawsuits were having, the California legislature passed an anti-SLAPP law in September of 1992.[79] This law, entitled "Demanding Relief in Civil Actions", was designed to provide a shield for community residents from SLAPP suits which were brought solely to harass and eliminate public

[79] Cal. Code of Civil Procedure § 425.16.

participation in matters of public concern. It preserves the basic rights of free speech while denying the improper use of the judicial system.

The law states that when a lawsuit arises from the exercise of free speech or right to petition a matter of public interest, the complaint is subject to a special motion to strike which may be brought within 60 days of the SLAPP filing. This special motion to strike the complaint has the legal effect of dismissing the entire lawsuit at a very early stage in the proceedings.

Section 425.16 of the California Code of Civil Procedure became effective on January 1, 1993 and offers the most promising solution to the problem of SLAPPs. For example, some of the time and expense of a lawsuit can be avoided since all discovery (often the most expensive and overwhelming part of a lawsuit) is stayed until the judge rules on the motion. During the hearing on the motion, the defendant moving to strike the complaint has the burden of showing the lawsuit arose from the defendant's exercise of her right of free speech (or right of petition) regarding a public issue. If the defendant succeeds in meeting this burden, the complaint will be dismissed unless the plaintiff can show that he will probably win the case at trial. If the court is not convinced that the plaintiff has a good chance of winning the case, the case will be dismissed.

Another benefit to the anti-SLAPP law is the fast resolution of the dispute. The law provides that there must be a hearing on the motion no later than 30 days after the other party is notified of the motion. The hearing may be scheduled for a later date if the court calendar makes a later date necessary. Because the lawsuit can be dismissed at an early stage in the case, the defendant can limit the diversion of money and energy away from the real protest. Finally, if the motion to strike is granted, the defendant can recover attorney's fees and litigation costs from the plaintiff.

Recently, the California Appellate Court had the opportunity to interpret Section 425.16. In Dixon v. Superior Court of Orange County,[80] an archeology professor at California State University at Long Beach (Dixon) challenged the work of the University's contractor ("SRS") who was hired to perform archeological tests on University property designated as an historic place. Dixon's statements were the direct result of the University's request for comments on the contractor's report. Dixon wrote a letter criticizing the report and concluded the report was poorly done, biased and should be withdrawn. The University continued using SRS's services despite Dixon's comments. Later, when the University solicited SRS to do additional work related to the

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[80] 30 Cal. App. 4th 733 (1994).

historic site, Dixon wrote several additional letters again stating SRS's earlier work was flawed, biased and unprofessional. Ultimately the University asked SRS not to bid on the new contract because of Dixon's strong opposition.

SRS then filed a lawsuit against Dixon seeking $570,000 in damages. The complaint alleged that Dixon had intentionally interfered with SRS's contractual relations with the University, had committed libel, slander and intentionally interfered with SRS's prospective economic advantage. After filing his answer to SRS's complaint, Dixon moved to strike the complaint under California Civil Procedure Code Section 425.16.

At the hearing, the court found that the defendant-citizen was completely protected from the libel suit. The court's conclusion was based on the fact that the construction project was governed by the California Environmental Quality Act ("CEQA"),[81] which has an express provision that requires the solicitation of public comment on all projects impacting the environment. Thus, the court effectively broadened the protective shield of Section 425.16 when it held that statements made in response to a statutory invitation to express an opinion will be granted total immunity.

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[81] Cal. Code of Public Resources §§ 21050 et seq.

IV. WHAT YOU CAN DO TO AVOID A SLAPP LAWSUIT

There are some precautionary measures which can be taken to avoid becoming a SLAPP defendant. First and foremost, any comments that you make should be made with the intention of influencing the government process and not for the purpose of injuring or harassing another. An individual will be held liable for making public comments which are really intended to harass another person.

Second, you should always be careful to avoid making any statement which you know is not true. Making public statements which you know are not true and which injure another's reputation is valid grounds for a defamation action. Therefore, you should be accurate, avoid exaggerating and making personal or insulting remarks.

Finally, if you are speaking or writing on behalf of an organization check the organization's incorporation status and insurance. Both of these may provide limited protection if you are named in a SLAPP lawsuit. For example, by speaking on behalf of an incorporated organization, your personal assets may be protected because the organization's assets would be attached first in order to pay any lawsuit claims. Also an established organization may have a business insurance policy which will protect you if you are made a party to a lawsuit

while carrying out the business of the organization. An incorporated group may also be in a better position to purchase an insurance policy. You might also check the homeowner policy that you own since it may also provide some personal protection.

V. DEFENDING AGAINST A SLAPP LAWSUIT

In the event a Section 425.16 motion does not result in a dismissal of the case, the court will order the case to go forward. As the defendant in a SLAPP lawsuit, your strongest defense is the First Amendment of the United States Constitution. Under the Constitution, individuals are guaranteed the right to speak freely on any subject, with a few exceptions (i.e., there is no constitutional right to speak freely about pornography or speak in such a manner as to incite violence.). Because making Constitutional arguments can be very complicated, it is very likely that you will need an attorney to assist you if you intend to use this defense.

California also has its own law to protect free speech. Under California Civil Code Section 47, statements made during legislative and judicial proceedings are protected. Any communication, oral or written, even if made

outside the actual proceedings, can not be the basis for a lawsuit as long as the statement has a legitimate connection to the proceedings.

As stated above, the plaintiff in a SLAPP lawsuit is not primarily interested in winning the case but rather silencing negative public opinion. As a result, simply defending against a SLAPP suit is not the best deterrent to those filing SLAPP lawsuits. But there is a "SLAPP-back" solution: file your own lawsuit against the plaintiff for violating federal and state Constitutional rights and civil rights, malicious prosecution or abuse of process.

In California, there have been some impressive SLAPP-back damage awards for defendants who filed their own suits for malicious prosecution.[82] However, the major drawback to this approach is the fact that in a lawsuit for malicious prosecution the defendant must first win in the original SLAPP lawsuit. Therefore, the defendant in the original SLAPP suit must go through the time and expense of an entire trial and win. Only then can the defendant "SLAPP-back" with his or her own lawsuit for malicious prosecution.

As an alternative, a defendant might file an action for abuse of process. Under this theory, the defendant must establish that even though the plaintiff's complaint may have been legitimate, it was really a means to threaten or

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[82] See, Thompson v. J.G. Boswell Co., No. 179027 (Cal. Superior Court Kern County, July 14, 1988.) (where jury awarded plaintiff $13 million)

blackmail the defendant. Because this type of suit is procedural in nature, the defendant need not wait until he or she wins the original SLAPP before filing the abuse of process lawsuit. However, in order to win the abuse of process lawsuit, the defendant must have evidence of the plaintiff's ulterior motive, and acquiring such evidence may not be easy.

A case might also be brought under California's Constitution. Under Article I, Section 2 of the California Constitution, free speech is guaranteed to all citizens of the State. California courts have held that the state's constitution also gives citizens the right to sue for damages when their rights of free speech are infringed upon by another.[83] If a defendant chooses to use this theory in order to "SLAPP-back," he or she will have to show that the plaintiff in the original SLAPP lawsuit intentionally deprived the defendant of his or her constitutional rights and that deprivation resulted in some actual damage or harm to the defendant.

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[83] See, Laguna Publishing Co. v. Golden Rain Foundation, 131 Cal. App. 3d 816 (1982).